Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

E.L. CLARK,

Petitioner,

vs.

DERRELL O. FANCHER; ALABAMA STATE HEALTH PLANNING AGENCY; ALBERTVILLE NURSING HOME, INC. and BARFIELD HEALTH CARE, INC.,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

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138 AP

QUESTIONS PRESENTED

I. Whether there exists a viable federal question for review by the Supreme Court of the United States?

II. Whether a state administrative agency can lawfully change its historical interpretation of applicable statutes and regulations so as to dispossess an affected party of his property without compensation and in a manner which is wholly different from similarly situated persons or entites?

LIST OF PARTIES

Petitioner/Appellant:

E. L. Clark, an Individual. (No corporations, parent corporations or subsidiaries involved)

Respondents/Appellees:

Derrell O. Fancher, an Individual, who has been replaced as Executive Director of the Alabama State Health Planning Agency by Elbert Peters, an Individual.

Alabama State Health Planning Agency, an Agency or Instrumentality of the State of Alabama.

Albertville Nursing Home, Inc., an Alabama corporation. (No parent corporation or subsidiaries involved)

Barfield Health Care, Inc., an Alabama corporation. (No parent corporation or subsidiaries involved)

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OPINIONS BELOW

The Supreme Court of Alabama denied the petition for writ of certiorari to the Alabama Court of Civil Appeals filed by petitioner E. L. Clark ("Clark") on May 19, 1995. (*See* Appendix A hereto). The time for the filing of this Petition was extended by Justice Kennedy, on August 4, 1995, to and including October 2, 1995. The Alabama Court of Civil Appeals decision, from which this appeal is taken, is *E. L. Clark v. Derrell O. Fancher, et al.*,

1994 Ala. Civ. App. LEXIS 295, ___ So. 2d ___ (Ala. Civ. App. 1994), *cert. denied*, _ So. 2d _ (1995).

STATEMENT OF JURISDICTION

The decision being reviewed by this Court is the judgment of the Alabama Court of Civil Appeals dated June 17, 1994. (Appendix "D" hereto). The Alabama Court of Civil Appeals denied rehearing on July 29, 1994. (Appendix "C" hereto). The Supreme Court of Alabama initially granted Clark's petition for writ of certiorari on November 30, 1994 (Appendix "B" hereto) but, subsequently, quashed the writ and denied the petition on May 19, 1995 (Appendix "A" hereto).

This Court has jurisdiction over the present case under and by virtue of 28 U.S.C. § 1257 (a) of the United States Code. Moreover, Supreme Court Rule 10.1 (c) states that jurisdiction is properly conferred "when a state court . . . has decided an important question of federal law in a way which conflicts with the applicable decisions of the Court."

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Amendment XIV of the Constitution of the United States; the State of Alabama Code of 1975, Sections 22-21-260 *et seq.* of the Code of Alabama (1975) and the regulations governing the award of applications for Certificates of Need, referred to as the State Health Planning Agency ("SHPA") "Procedures Manual (Rev. 1979)" and the SHPA "Rules and Regulations (Rev. 1991)" are relevant to this matter. Certain of these provisions, statutes or regulations are set out in the Appendices hereto, as shown below, *viz:*

Amendment XIV, § 1, Constitution of the United States — Appendix H

Code of Alabama (1975), § 22-21-260(5), (6), (10), (11), (13) — Appendix I

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STATEMENT OF THE CASE

This case has had a long and tortured existence. It began more than ten (10) years ago, on August 13, 1985, in a state

agency hearing room in Montgomery, Alabama. On that date, the Alabama State Health Planning Agency ("SHPA") conducted what it said was an "emergency" administrative hearing; its purpose was to consider applications seeking SHPA regulatory approval for the proposed relocation of two skilled nursing (*e.g.*, "nursing home") facilities which were in existence and being operated in Marshall County, Alabama. As Alabama's sole health planning agency, SHPA is charged with the responsibility of "prevent[ing] the construction of unnecessary and inappropriate health care facilities through a system of mandatory reviews of new institutional health services. . . ." Section 22-21-261 of the Code of Alabama (1975). (*See* Appendix "J"). Accordingly, proposed relocations of existing health care facilities (particularly when the relocations involve the construction of new or "replacement" facilities) must have SHPA approval in order for the relocations to be lawfully accomplished. Sections 22-21-263 (a) (3) and 22-21-265 (a) of the Code of Alabama (1975). (*See* Appendices "K" and "L").

The most significant legal problem presented by the SHPA "emergency" hearing was the fact that the owner of the two nursing homes, petitioner E. L. Clark, was never furnished (by SHPA or by the parties filing the applications) with any notice whatever of the filing of the so-called "emergency relocation" applications — or of the SHPA hearing. Moreover, Mr. Clark was neither an applicant for, nor has he ever subsequently agreed to, the proposed "relocation" of his two nursing home facilities, the construction and operation of which **predated** the 1979 advent of the Certificate of Need ("CON") program in Alabama. The relocation applications were filed not by Mr. Clark, as the owner, but by Albertville Nursing Home, Inc. and Barfield Health Care, Inc. as the lessee-operators of the Clark facilities.

The lessee-operators took the position, at the SHPA hearing, that there were significant structural deficiencies in the two

facilities and that both of the nursing homes needed to be "replaced." The lessees, therefore, sought SHPA approval for them to construct "replacement" nursing homes in Marshall County. Because he was never furnished with a pre-hearing notice, Mr. Clark was not present when the SHPA considered the proposed relocations. The SHPA Certificate of Need Review Board's hearing transcript indicates that the nursing home owner was not expected to attend the meeting for purposes of voicing any opposition to the proposed construction of "replacement" facilities.

After the Agency issued its approval for the replacement projects, the lessee-operators commenced construction of new nursing home facilities. When Clark learned what had occurred, he immediately registered his opposition to the construction projects with SHPA. SHPA refused to take action on his complaint, however, saying that its decisions on the two "emergency relocations" were final and non-appealable. Therefore, Clark filed a federal action in the United States District Court for the Middle District of Alabama on or about February 6, 1986, *E. L. Clark v. Derrill Crowe, et al.*, Case No. 86-T-139-N. In his federal action, subsequently amended, Clark took the position that he had suffered a fundamental deprivation of due process of law through the actions of SHPA and his former lessee-operators. He argued that pre-deprivation process had been altogether feasible and practicable and, therefore, that SHPA should be compelled to take corrective action. He also claimed that the decision to allow the relocation and replacement violated the Constitution's due process clause because it was arbitrary and capricious. The district court agreed.

Judge Myron Thompson wrote that the court was "convinced, from a review of Alabama law, that a person holding a CON issued by SHPA has a protected property interest in that CON which can be taken away only if attended by adequate

procedural protections. The CON statute provides that a person holding a CON retains the privileges authorized under it until he or she fails to offer the authorized health care facilities and services for a period of twelve months. The CON can, therefore, be terminated only for cause." The court further noted that SHPA's 1979 Procedures Manual "expressly contain[ed] a 'grandfather clause' covering existing [health care] facilities. Moreover, the directors and board members of SHPA have routinely used the term 'grandfather status' to refer to such facilities." (*See* Appendix "R" hereto).

The district court held that Mr. Clark was entitled to full participation in a new SHPA hearing. "Because SHPA improperly denied Clark notice of [the lessee-operators'] requests to transfer beds from Clark's facilities to their own, and an opportunity to be heard on these requests, SHPA must now offer Clark a meaningful opportunity to be heard on the requests and must further reconsider the requests *de novo* in light of any appropriate comments and evidence Clark might present. The court will, therefore, enter appropriate declaratory and injunctive relief to this effect." Judge Thompson noted, in his memorandum opinion, that the ultimate decision which had to be reached was "whether Clark holds a grandfathered interest in the Albertville and Guntersville facilities. SHPA argues that Clark was a simple landlord, who had at most only a property interest in the physical buildings at Albertville and Guntersville. **The credible evidence before the court does not fully support this contention.** The court agrees with Clay H. Dean, the drafter of the CON legislation and a former director of SHPA, that Clark leased more to [the former lessee-operators] that just physical plants. **He leased nursing home operations to them.** Clark and his tenants agreed that the tenants would continue to operate and administer nursing homes in the two facilities. An express condition in the lease contracts was, therefore, that the tenants would take over nursing home operations. Moreover, in one of the leases entered

into by the parties, Clark leased a specific number of 'beds,' and calculated the rent by the number of 'beds' in use in the building. This lease further provided that, should the tenant expand the nursing home beds in that facility, there would be a proportional increase in rent. The court agrees with Dean and finds from the evidence that Clark had a sufficient interest in the operation of the two facilities to enjoy a 'grandfather[ed] status' when the CON statute went into effect in 1979." (Emphasis added).

While the district court found that the Clark property interest was substantial and definite enough to entitle him to *procedural* due process protection, it concluded that the question of *substantive* due process was a matter best left to the state agency and to Alabama's judicial system. "The court cannot say that [Mr. Clark's grandfathered] status was exclusive, however. [The two former lessees], as operators of the two nursing homes, also had an expectation in the continued operation of the two facilities when the CON law went into effect [in 1979].

"Clark asks that the court determine who holds the superior interest. The court declines the invitation. The determination turns on more than just legal principles. Whether a lessor or a lessee of a nursing home operation should be considered as the superior holder of a grandfathered operation is more than likely also a matter of policy. Indeed, there was conflicting testimony before the court as to which result in general, and in this case specifically, would better further the public interests of the CON statute. SHPA should resolve this issue, not the court." Accordingly, the matter was sent back to the SHPA with instructions that SHPA conduct a public hearing on the proposed "relocation" of the two facilities and that Mr. Clark be permitted to participate therein.

The "contested case proceedings," conducted on remand, were accomplished under the aegis of the Alabama

Administrative Procedure Act. § 41-22-1, *et seq.*, of the Code of Alabama (1975). Under and by virtue of those proceedings, several facts were established which Clark contends should have been, but which were apparently not deemed to be, of paramount importance to the SHPA decisionmaking process, viz:

1. Other than the case which was under review, no SHPA employee could identify a prior instance wherein CON approval had been sought and/or granted for the "relocation" or "replacement" of a health care facility by the lessee-operator thereof and without the knowledge and consent of the owner of the facility. SHPA has historically had the practice of recognizing the *owners* of health care facilities, the construction and operation of which predated the advent of the CON review program, as the persons or entities having the permanent interest in and to the facilities' "bed authority" rather than the mere *operators* of the facilities. SHPA offered no explanation as to why Clark was being treated differently.

2. James Sanders, Director of SHPA CON Review and Operations, testified that with the exception of the E. L. Clark case, he was unaware of any "relocation" CON application — "emergency" or otherwise — which had been granted by SHPA without the owner of the facility either knowing about it or concurring in the proposal. He further testified that it was commonplace at the SHPA to hear the term "leasing the beds of a facility," a reference having to do with the practice of facility owners' entering into management contracts and lease agreements with third parties who would operate the facilities. At the end of he contract or lease, of course, all right, title and interest in and to the facility and its "bed authority" remained with the owner of the facility.

3. Former SHPA Deputy Director and Acting Executive Director, Charlie Stewart, testified that he could not recall any instance wherein a health care facility had been established and operated in the pre-CON period before 1979, then later leased to an operator and then later leased to yet another operator and where the second or third generation operator leased from the *previous* lessee or the lessee in possession of the facility on the effective date of the CON program. In each instance, the later lessee-operators had all leased from the pre-1979 *owner* of the facility. Said another way, SHPA had historically recognized the 1979-era *owners* of Alabama health care facilities as the persons or entities "grandfathered" for continued SHPA recognition — not the persons or entities that were merely leasing or operating facilities on the effective date of the Alabama CON program. (E.g., ***facility leasehold interests were grandfathered in 1979 for the durations thereof but the permanent right, title and interest in and to a facility's "bed authority" continued to be the property of the owner of the facility. Said another way, SHPA has historically treated leasehold interests as having a grandfathered status subject to expiration at the end of the lease; on the other hand, the "bed authority" for a health care facility does not expire).***

4. Other than the E. L. Clark case, no other "emergency" CON applications have been filed with SHPA proposing the "relocation" of entire health care facilities, without there having been any testimony from the moving parties aside from the statements of their legal counsel. Other than this case, no other "emergency" CON applications have ever been received, processed and decided by SHPA without the applicants' having first paid, in advance, the requisite CON application filing fees. Other than this case, if and in the event the "emergency" CON

commitment or obligation were not incurred within ninety (90) days of the CON approval, SHPA would declare the "emergency" approval to be null and void and of no further legal force or effect. Petitioner Clark suggested below, as he does here, that such utterly unique circumstances give rise to the logical inference that he was "singled out" for the illegal treatment complained of herein.

5. Alan Koch, who testified as an expert witness in support of the position of the lessee-operators, initially stated that based upon the operation of the CON program in Alabama, SHPA had treated the *operators* of health care facilities, as of the effective date of the CON law in 1979, as the "health care facility" for purposes of CON review. In other words, according to Koch, entities such as Albertville Nursing Home, Inc. and Barfield Health Care, Inc., if they had been the lessee-operators of existing health care facilities on the effective date of the CON program, had been treated by SHPA as having the permanent rights in and to the designated "bed authority" of the facility they were operating.

However, on cross examination, Mr. Koch was wholly unable to explain how it is that *subsequent* lessee-operators (*i.e.*, persons or firms who leased and operated health care facilities at some time *following* the expiration of the leases of the persons or firms who or which had been operating the facilities on the effective date of the CON program in 1979) acquired the right to lease and operate CON approved facilities when the leases of such subsequent parties were entered into *not* with the 1979-vintage lessee-operators but with the original *owners* of the respective health care facilities. If the respondents' theory in this case represented a correct statement of SHPA policy and practice, each succeeding *lessee-operator* would "lease" or purchase his

or her CON "bed authority rights" from the immediately *preceding* lessee-operator.

Under the respondents' "theory" of the case, there would necessarily have to be a continuous chain of "bed authority" acquisition running all the way back, in the case of each health care facility, to the person or entity which was the operator of the facility on July 30, 1979. ***This has not, in fact, been the SHPA's practice during the years of its operation in Alabama.***

6. Testimony from Tigner Zorn, former Director of the Bureau of Health Facilities Construction of the Alabama Department of Public Health, was to the effect that he knew of no basis for, nor any procedures connected with, the SHPA's inspecting health care facilities for structural deficiencies instead of — or even in some conjunction with — the State of Alabama Department of Public Health. He testified he had never been involved with any kind of joint inspection of any kind of a health care facility with officials from the SHPA. In fact, Zorn testified that he was unaware of *any* state department or agency *other than* the Department of Public Health which is charged with the responsibility of regularly inspecting Alabama's health care facilities for structural defects. This, petitioner Clark has contended, was clear evidence in support of his proposition that if there had truly been something structurally "wrong" or dangerous at his two nursing home facilities, the Department of Public Health would have required the conditions to be brought up to Code standards. Failing to get this done, Public Health could have revoked the operational licenses for the two nursing homes. This was never done, however. Such fact simply underscores the fact that SHPA should never have been involved in the Clark nursing home matter to begin with.

Said another way, if the issues in dispute had to do with structural deficiencies in the two Clark nursing homes, those issues should have been resolved by the Alabama Department of Public Health and *not* the Alabama State Health Planning Agency. In effect, SHPA moved into an area where it had no authority and it purported to use the "emergency CON application" regulations as the "basis" for what it did with the E. L. Clark nursing home "bed authority."

7. Petitioner Clark relied, at the administrative hearing level, upon the expert testimony of Clay H. Dean, the former SHPA Executive Director and the author of the Alabama CON statute and the original SHPA *Procedures Manual* (1979). Among other things, Mr. Dean testified:

> (a) Health care facilities which were in existence and being operated as such on the effective date of the CON law in Alabama, July 30, 1979, were "grandfathered" and they continued to enjoy a permanent "franchise" from that date forward with regard to the "bed authority" extant on such date at such facilities.
>
> (b) CON authority issued or conferred by SHPA — whether by "grandfathering" or by the execution of a new Certificate of Need document — does not, by itself, authorize the CON holder to "operate" a health care facility in the licensing sense of the word. Rather, it simply authorizes the CON holder "to show the state that he is capable and has a plan and can finance a health care facility up to the point where it opens to serve. The CON does not authorize him to operate anything; but to prepare to become capable of operating a facility." In short, the CON authority is legal authorization for the holder to "offer" institutional health services *(i.e.*, through the

holder's securing of a license; through the holder's employment of an administrator who is licensed; through a lease of the health care facility or through the association of a management company designed to operate the facility).

(c) The establishment of the Alabama CON program did not authorize the state to "take any other action [with regard to existing health care facilities and services in place on the effective date of the Act]. It [did not] authorize the state to close [facilities] simply because [they did not have or obtain] a CON."

(d) The CON "grandfathering" process entitled E. L. Clark, following the effective date of the CON statute, to continue owning his nursing homes with their respective bed authorities and to offer health services in or through such beds. He was "grandfathered" so that he could do so by applying for a license himself or by leasing the facilities to lessee operators who could obtain licenses to run the facilities.

(e) What existed on the effective date of the CON law, insofar as Clark was concerned, was two nursing home facilities — not simply "buildings" — with 133 beds in one nursing home and 103 beds in the other. Also on that date, two leases existed authorizing the lessee-operators to continue their operation of the Clark facilities for the duration of the leases. These things combined — that is, the health care facilities and the people who were operating them — constituted the total package which was "grandfathered" (albeit for different durations) under the CON program. However, the "basic facility is what — the owning entity is the basic facility. When the leasehold . . . all [the owner] is doing is leasing

that facility for somebody else to operate it. If the basic facility does not exist, the lessor could not operate a health facility. [No one] could get a license."

(f) A "building" which is leased to some party under a regular real estate ground lease" is not a "health care facility" for CON purposes. Rather, a health care facility is a building that is built, designed, equipped [and] maintained to offer a health service."

(g) Despite the fact that Clark had personally operated the two facilities only a short time himself — and only the Albertville facility as of the effective date of the CON law in Alabama — it is true, for CON purposes, that Clark had "offered" nursing home services *continually* through both facilities from the date they were each opened. The fact he was "offering" services through *lessees* rather than by obtaining a license *himself* had nothing to do with the fact of his "offering" healthcare services in or through the facilities and as contemplated by the Alabama CON statute.

(h) The "grandfathered" interest of Mr. Clark in and to his nuring home facilities and the "bed authority" thereof continued indefinitely under the CON program's normal and customary operation. On the other hand, the "grandfathered" interests of the lessee-operators continued for the terms of their respective leases. When the leases expired, the interests of the operators (which they had temporarily acquired from petitioner Clark by virtue of their lease of his "bed authority") also expired.

(i) Clark was never a mere "landlord" at least insofar as the normal operation of the Alabama CON program was concerned. In both instances, "Clark built a

nursing home. It was designed for a nursing home. It was inspected as a nursing home. It was approved as a nursing home. It was equipped as a nursing home. And he had presented to the State Board of Health a staffing proposal to operate it as a nursing home. So it was a nursing home. And then he elected to lease [the nursing home to a lessee-operator for a finite period of time]."

(j) Based upon the normal operation of the Alabama CON program, the emergency" CON procedures are to be utilized only with regard to unforeseen events that endanger the health and safety of the patients." According to Mr. Dean, he could not find anything factually that could be classified as "unforeseen events" with regard to either the Albertville or the Guntersville facility.

8. Judge Thompson's ruling in the federal action made it clear that the Alabama CON statute, once effective, authorized a person "to offer" health care facilities and services in only two circumstances: (1) if the person had obtained a CON from SHPA therefor or (2) if the person was already "offering" the facility or services when the CON statute went into effect. If a person sought to offer health care facilities and/or services under any other circumstances, SHPA would consider the operation as illegal under the CON statute and would normally seek a court injunction to enjoin the same. [Memorandum Opinion at p. 5].

9. Judge Thompson's ruling made it clear that under the normal and customary operation of the Alabama CON program, neither Clark nor his two lessee-operators at Albertville and Guntersville, were required to obtain CON's in order that skilled nursing services could continue to be "offered" in or through the two referenced facilities. Clark

and his lessee-operators could continue to offer services in or through the 236 bed authority of the two nursing homes without CON approval; a CON would be required only if or when a decision were made to build new or "replacement" facilities or to offer new institutional health services as defined by law. The two nursing home facilities were, in effect, "grandfathered" in under the Alabama CON program. [Memorandum Opinion at pp. 5-6].

10. The value of "grandfathered" facilities, such as those at Albertville and Guntersville, increased dramatically — especially in those areas such as Marshall County where the "net need" for beds had been exhausted (*i.e.*, filled). The CON law, by restricting the number of beds which could be located in a county and by "grandfathering" in these existing facilities, conferred a new nd independent value on these facilities. Such facilities could lose their CON status under the review program only when health care services ceased to be "offered" in or through the nursing homes for a period of twelve (12) months or more. *A nursing home facility without CON authorization (whether by "grandfathering" or by the issuance of a Certificate) was (and is) of no value at all as a nursing home.* (Emphasis added). [Memorandum Opinion at p. 6].

In other words, once the "bed authority" was stripped from the Clark nursing home facilities, the naked structures themselves were valueless to Mr. Clark. The design, equipment and space utilization schemes attendant to both structures were all related to *skilled nursing facility operations* and nothing else. Therefore, the true "value" of the facilities — for E. L. Clark — resided in the SHPA-recognized "bed authority" of the two nursing homes and not in the bricks and mortar of the two "buildings." *For this*

reason, Clark has contended from the outset of this litigation that he has been dispossessed of his property without compensation and in violation of his constitutional right to be free from the deprivation of substantive due process. Regardless of the procedural niceties which attended the "remand" hearing before the State Health Planning Agency, Mr. Clark was deprived of his "grandfathered" status and such deprivation is simply unauthorized under well settled Alabama law. Regardless of the procedures which were employed at the hearing, SHPA has done something that it is just not authorized under law to do: take away the Clark "bed authority" and "give it" to other persons or entities.

11. Even at the "remand" hearing before SHPA, the "relocation" proponents contended that it was mandatory that the new facilities be utilized in place of the Clark nursing homes. The "health and safety of the residents" was cited as the over riding concern and was assigned as the legal basis for the proposed CON approval. Yet the evidence demonstrated that none of the alleged structural defects in the Clark nursing homes had affected the continued reimbursement of the two nursing homes by the Alabama Medicaid Agency during the period of 1979 through 1985. No explanation was ever offered as to why Medicaid had not terminated the two facilities' reimbursement if they were being operated in dangerous conditions.

Additionally, the record is clear that neither facility suffered a licensure revocation or even a licensure "downgrade" during the leasehold terms of the Clark lessee-operators. The Alabama Department of Public Health is authorized to place nursing home and hospital facilities on "probation" — and, in extreme cases, to revoke the licenses — when serious operational or structural defects are found

and not corrected. This simply did not happen with the Albertville and Guntersville facilities, giving further weight to the Clark argument that this was a contrived "hearing" designed to give the appearance of legitimacy to what was otherwise an illegal confiscation of his private property.

12. As some further indication of the lengths to which the SHPA was willing to go in "upholding" its original decision in favor of the Clark lessee-operators, the Supreme Court should know that the SHPA opined that Albertville Nursing Home, Inc. and Barfield Health Care, Inc., were entitled to CON approval at the expense of petitioner E. L. Clark. Yet, under the lessee-operators' legal theory" in this matter, their "rights" to the Clark "bed authority" must be based upon ***who were the operators of the nursing homes on the date the CON law became effective in Alabama.*** It is interesting (and informative) to note that Barfield Health Care, Inc., ***was not even in existence on July 30, 1979.*** The 1979 operator of the Guntersville facility was NOT "Barfield Health Care, Inc." but, rather, another corporation by the name of "Claysville-Guntersville Nursing Home, Inc." Barfield Health Care, Inc., was simply a later sub-lessee of Claysville-Guntersville Nursing Home, Inc.

The SHPA administrative order seeks to "overcome" this deficiency by stating that to the extent "necessary" in order to effectuate approval of Barfield Health Care, Inc., the CON rights of Claysville-Guntersville Nursing Home, Inc., are "transferred" to Barfield. This Court should note, with great concern, just how *determined* this indicates the SHPA to have been in this matter. Alabama law is clear that a Certificate of Need ***is not transferable, assignable or convertible and it is valid solely to the person and purpose named thereon. The attempted or purported "transfer" from Claysville-Guntersville Nursing Home, Inc., to***

Barfield Health Care, Inc. (which also makes the threshold assumption that the former corporation had CON "bed authority" which it was capable of transferring to the latter) is void as a matter of law.

See Appendix "S" hereto.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT HAS JURISDICTION OVER THIS CASE AND MAY APPROPRIATELY DECIDE THE QUESTION PRESENTED FOR REVIEW.

This Court has held that, in order for it to be in position to assume jurisdiction over a case, the federal question presented in that case must be "either raised or squarely considered and resolved in the state court." *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983). In the present case, the petitioner raised — in both federal and state actions — the issues related to deprivation of procedural and substantive due process.

In the amended federal complaint, Clark alleged that he had "been deprived of both procedural and substantive due process guarantees of the Fourteenth Amendment to the United States Constitution. He says the actions complained of were not random and unauthorized acts of state employees or actors but they were taken pursuant to established state procedures (*i.e.*, the "emergency CON" procedures of the State Health Planning Agency)."

After prevailing on his initial procedural due process claims in United States District Court, Clark renewed his substantive arguments at the SHPA administrative agency level. After SHPA,

for the second time, dispossessed him of his "bed authority" rights, Clark advanced his constitutional claims at the state circuit court level. In those proceedings, he alleged that the actions taken by SHPA were "in violation of constitutional or statutory provisions"; that they were "in excess of the statutory authority of the agency"; that they were "made upon unlawful procedures" and that, in particular, the actions had been "unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." He further asserted that he had "been deprived of his constitutionally guaranteed right to equal protection of the law and due process of law by and through the agency action complained of." Although the constitutional argument was clearly and appropriately raised in the circuit court of Montgomery County, the retired judge who was called in to hear the case never addressed it. (*See* Appendix "E" hereto).

In the appeal to the Alabama Court of Civil Appeals, Clark once again argued the deprivation of due process in and through the unauthorized action of the SHPA. He asserted that "there was no legal way for the [lessee] applications to conform to each of the 'five required findings' of Section 22-21-266 of the Code of Alabama (1975). * * * For a state agency to interpret and enforce its rules, regulations and policies in one manner and fashion for certain persons, but in a totally different (and harmful) manner for other persons ***is absolutely a denial of the procedural due process rights of the adversely affected party; in this case, Mr. Clark.*** * * * In addition, as asserted previously, the SHPA action rises to the level of an unconstitutional 'taking' of Mr. Clark's property, further violating his constitutional right to be free from substantive due process . . . wrongs."

Unfortunately, the Court of Civil Appeals was apparently impressed by the fact that the administrative record "contains almost 1930 pages of transcribed testimony and 500 exhibits."

Focusing upon evidence related to structural problems with the nursing homes — and totally ignoring the constitutional arguments related to the Clark property interests — the Court of Civil Appeals affirmed the trial level court. (*See* Appendix "D" hereto).

In his petition for writ of certiorari filed with the Alabama Supreme Court, Mr. Clark renewed his constitutional argument. He asserted that the SHPA had acted one way in his case and in a different way in every other case it had reviewed and that this was a denial of procedural due process. Further, he argued that "the SHPA action amounts to an unconstitutional 'taking' of Mr. Clark's property, further violating his constitutional right to be free from substantive due process injuries."

The Alabama Supreme Court also ignored his constitutional arguments. After initially granting Mr. Clark's petition (*see* Appendix "B" hereto) it later quashed the writ and denied the petition (*see* Appendix "A" hereto).

Petitioner E. L. Clark, therefore, pleads with the United States Supreme Court to address the merits of his constitutional claim of deprivation of due process of law.

II.

THE ACTION OF THE STATE HEALTH PLANNING AGENCY IS AN UNCONSTITUTIONAL "TAKING" OF THE PETITIONER'S PROPERTY AND A VIOLATION OF HIS PROCEDURAL DUE PROCESS RIGHTS.

Mr. Clark is entitled to a full, merits-based, review for at least two important reasons. ***First,*** the action of the SHPA amounts to an unconstitutional "taking" of his property in derogation of his constitutionally guaranteed right to be free from

substantive due process violations. ***Second,*** the SHPA action is procedurally infirm because — as clearly shown by the record itself — the state agency has acted in one fashion as to E. L. Clark but in a totally different fashion with regard to every other "relocation" application it has ever handled. Such arbitrary and capricious conduct violates Clark's right to be free from procedural due process violations under the Fourteenth Amendment.

In substantive due process claims, this Court has made it clear that each case must be examined on its own facts. Many different kinds of conduct can violate the "takings" clause of the constitution. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 81 L. Ed. 2d 815, 104 S.Ct. 2862 (1984) (each case must be independently reviewed); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987) (deprivation of all uses of land can violate "takings" clause); *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) (land use regulation which denies owner economically viable use of his land can be a "taking"). It is also clear that a government regulation's interference with a property owner's "reasonable, [or distinct] investment-backed expectations" can constitute a taking." *Penn Central, supra; Kaiser Aetna v. United States*, 444 U.S. 164, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979). This Court has identified many factors which should be taken into account when determining whether a governmental action has gone beyond reasonable regulation and effected a "taking": the character of the government action, its economic impact and its interference with the reasonable, investment-backed, expectations of the plaintiff. *Ruckelshaus*, 467 U.S. at 1005. A "reasonable investment-backed, expectation" must be more than a "unilateral expectation or an abstract need." *Id.* (citation omitted).

In this case, E. L. Clark obviously had more than a "unilateral expectation" that he could continue to enjoy the fruits of his property. Indeed, he built his nursing homes *before* there *was* a "Certificate of Need" program in Alabama; the facilities were — by express statutory grant — "grandfathered" for continued use and operation as nursing homes. Yet, without compensation and without statutory authority for doing so, the SHPA has dispossessed Mr. Clark of his property and it has ostensibly "transferred" it to his former lessee-operators.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798, 112 S. Ct. 2886, (1992), this Court made it clear that a governmental agency cannot "change the rules" or enact or interpret regulations so as to effectively dispossess a person of his or her property. Yet the State of Alabama, acting through the SHPA, has done precisely that in relation to Mr. Clark. Although the legislature decreed that the CON program would only apply to *new institutional health services* proposed to be offered or developed in Alabama after 1979 — and even though SHPA itself had a rule expressly "grandfathering" existing health care facilities for continued operation with their then-designated "bed authority" —Mr. Clark has had all that taken away from him. The only "explanation" has been that the nursing homes "needed replacing" because of structural problems. Yet the record is clear that such issue (if it existed in the first place) was one for the Department of Public Health, not the SHPA, to identify and resolve.

In *Resolution Trust Corporation v. Town of Highland Beach*, 18 F.3d 1536 (11th Cir. 1994), members of a joint venture filed a civil action against the city alleging denials of substantive and procedural due process. The claim was based upon the town's conduct in reinterpreting an ordinance to effect a termination date for the development of property which was earlier than previously had been represented to the plaintiffs. Finding that the

plaintiffs had a protectable property interest, the court, citing *Perry v. Sinderman*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), noted that property rights are not limited by a few rigid technical forms. Rather, "property" denotes a broad range of interests that are secured by existing rules or understandings. *Highland Beach* at 1544. Moreover, the court wrote that "reasonable expectations in a particular status may attain protected property status based upon a state law, regulation, policy or a mutually explicit understanding a governmental body puts forth, and such an interest may be implied from words or conduct." *Perry*, 408 U.S. at 601.

As noted previously, the record below makes it crystal clear that health care facility owners in Alabama have, in the years since 1979, enjoyed a specific "reasonable expectation in a particular status." That is, owners of health care facilities, the existence and operation of which predated the advent of the CON program in 1979, have had a "grandfathered" status in every case except the unique case of E. L. Clark. Only his case is said to be "different;" yet none of the respondents has been able to explain why this is so.

This is not a "licensure" case. It is a case dealing with a protected, "grandfathered," property interest. In *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989), a landowner brought an action against the city and its commissioners seeking relief for the alleged unlawful taking of its property without just compensation. It was held that the city's adoption of an ordinance which rezoned property of the landowner was an unconstitutional taking. The basis for the decision is summarized thusly: "[T]he original resolution granted appellant a property interest. The rezoning ordinance denied appellant this property interest because the new classification did not accomodate a development like the wood chipping operation [envisioned in the original

zoning]. The city commission's action, therefore, was a confiscatory measure. '[I]f a regulatory undertaking is confiscatory in nature, it is a taking.' " *Id.* at 1488 (citing *Wheeler v. City of Pleasant Grove,* 664 F.2d 99 (5th Cir. Unit B, Dec. 1981), *cert. denied,* 456 U.S. 973 (1982)). The court also rejected the city's argument that land use regulations which promote health, safety, morals or general welfare must — necessarily — be upheld.

The city contended that the district court had been correct in upholding its action stopping the plaintiff's development project as a proper exercise of police power. Yet such argument was rejected, with the court noting that if the public's complaints had been truly justified, criminal and civil remedies were available to resolve them. "While local regulations have been violated, the city cannot cure such violations with a measure that violates the constitution." *Id.* at 1488. **In much the same fashion, if the two Clark nursing homes had truly had structural deficiencies which threatened "the health and well being of the nursing home residents," there were plenty of ways to resolve the problems.** The most obvious method would have been with a complaint to the Department of Public Health, which would have required an immediate cure of the problems. Certainly this would have been a preferable (and lawful) means of resolving the problems. Instead, the lessee-operators, with the state agency's assistance, endeavored to totally dispossess Mr. Clark of his property rights without compensation and in total derogation of standing SHPA policy and practice.

The decision is also flawed for procedural due process reasons. The courts below should have found, as the evidence demonstrated, that the SHPA action was arbitrary and capricious and not made in compliance with applicable law. The Clark case, indeed, is *the only case in SHPA history wherein it has treated the mere lessee-operator of a health care facility as having the*

permanent control of the "bed authority" of such facility. "[I]t is essential that administrative rulings be consistent and that a radical departure from established interpretation and practice cannot be made except for compelling reasons. To act in one manner in one case and the opposite manner in another case, where the circumstances are the same in all material respects, would be to act arbitrarily or, at best, unreasonably. This amounts to a deprivation of procedural due process. *See, e.g., Mobile County Gas District v. Mobile Gas Service Corporation,* 227 So. 2d 565, 284 Ala. 664 (1969). In this regard, the former Fifth Circuit examined the effect of the lack of consistent standards in *Frozen Foods Express, Inc. v. United States,* 535 F.2d 877 (5th Cir. 1976), viz:

> . . . [L]aw does not permit an agency to grant to one person the right to do that which it denies to another similarly situated. **There may not be a rule for Monday, and another rule for Tuesday, a rule for general application, but denied outright in a specific case.**

535 F.2d at 880 (citations omitted)(emphasis added). As the court stated in *Frozen Foods,* "an agency of government cannot deny one a benefit and then grant it to another on a case-by-case basis without applying standards, since to do so would be to act arbitrarily and capriciously." 535 F.2d at 880; *see also, Pritchett v. Nathan Rodgers Construction and Realty Company,* 379 So. 2d 545 (Ala.1980). The arbitrary manipulation of the law, simply to suit the interest of the governmental agency, violates the principles of due process under the Fourteenth Amendment. As this Supreme Court has reaffirmed, "the Due Process Clause of the Fourteenth Amendment was intended to prevent government from abusing [its] power. . ." *Collins v. Harker Heights, TX,* 503 U.S. __, 117 L. Ed. 2d 261, 112 S. Ct. __ (1992).

CONCLUSION

In every case dealing with health care facility "relocations" since its creation in 1979, the Alabama State Health Planning Agency has treated the facility owner as the person or entity vested with the permanent right, title and interest in and to the "bed authority" of the subject facility. In the case of E. L. Clark, and only in this case, the SHPA has treated the former lessee-operators of the facilities as the entities authorized to file for relocation approval.

There is no justification for what has happened in this case. E. L. Clark has been struggling, since 1985, to regain control over the property which was taken from him. He has suffered both procedural and substantive violations of due process. He has been treated in one fashion while all other similarly situated persons and entities have been treated in another fashion. His property has been taken — confiscated — without compensation.

For the reasons cited, the petitioner respectfully suggests that the Supreme Court should agree to hear and decide this case on its merits. No other court, to date, has done so.

Respectfully submitted,

JUSTICE D. SMYTH, III
Counsel of Record
PHILIP H. BUTLER
ROBISON & BELSER, P.A.
Attorneys for Petitioner
210 Commerce Street
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Date: October 2, 1995

APPENDIX A — JUDGMENT OF THE SUPREME COURT OF ALABAMA FILED MAY 19, 1995

IN THE SUPREME COURT OF ALABAMA

May 19, 1995

1931567

Ex parte E.L. Clark. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: E.L. Clark v. Derrell O. Fancher, et al.) (AV93000054) (Montgomery: CV-91-2346)

CERTIFICATE OF JUDGMENT

WHEREAS, on November 30, 1994, a Writ of Certiorari to the Court of Civil Appeals was granted by this Court, and the cause was set down for submission pursuant to Rule 39, Alabama Rules of Appellate Procedure,

WHEREUPON, come the parties and the Petition for Writ of Certiorari being submitted and duly examined and understood by the Court, it is considered by the Court that the writ heretofore issued should be quashed and that the petition should be denied.

IT IS, THEREFORE, CONSIDERED AND ORDERED that the Writ of Certiorari heretofore issued to the Court of Civil Appeals be, and the same is hereby, quashed, and the Petition for Writ of Certiorari be, and the same is hereby, denied. NO COSTS TAXED. NO OPINION.

PER CURIAM — Maddox, Shores, Houston, Kennedy, Ingram and Cook, JJ., concur

Appendix A

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 19 day of May 1995

s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX B — DECISION OF THE SUPREME COURT OF ALABAMA FILED NOVEMBER 30, 1994

THE STATE OF ALABAMA -- JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
November 30, 1994

1931567

Ex parte E. L. Clark. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: E. L. Clark v. Derrell O. Fancher, et al.) (AV93000054) (Montgomery: CV-91-2346-G)

NOTICE

Petition for writ of certiorari to the Court of Civil Appeals is granted. See Rule 39(f) and (h), Alabama Rules of Appellate Procedure, for instructions regarding the filing of additional briefs and oral argument.

PER CURIAM — ALMON, HOUSTON, KENNEDY, INGRAM AND COOK, JJ.

PLEASE USE THE ABOVE CASE NUMBER ON ALL FILINGS IN CONNECTION WITH THIS CASE.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 30th day of Nov. 1994

s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX C — DECISION OF THE COURT OF CIVIL APPEALS, STATE OF ALABAMA, MONTGOMERY FILED JULY 29, 1994

OFFICE OF
CLERK OF THE COURT OF CIVIL APPEALS
STATE OF ALABAMA
MONTGOMERY

RE: *CV91-2347 AV93000054.00 July 29, 1994*

E.L. Clark vs. Appellant — *Derrell O. Fancher, et al.* Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

* * *

XXX Application for rehearing overruled. No opinion written on rehearing.

* * *

s/ John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals of Alabama

MAILING ADDRESS:
300 Dexter Avenue
Montgomery, Alabama 36104-3741

APPENDIX D — OPINION OF THE ALABAMA COURT OF CIVIL APPEALS FILED JUNE 17, 1994

ALABAMA
COURT OF CIVIL APPEALS

OCTOBER TERM, 1993-94

AV93000054

E. L. Clark

v.

Derrell O. Fancher, et al.

Appeal from Montgomery Circuit Court

(CV-91-2347)

ROBERTSON, Presiding Judge

This is an appeal from the judgment of the trial court affirming the decision of the Alabama State Health Planning Department Agency, which granted two Certificates of Need.

E. L. Clark leased buildings for the operation of nursing homes to Albertville Nursing Home, Inc. (Albertville), in Albertville, Alabama, and to Barfield Health Care, Inc. (Barfield), in the Claysville-Guntersville area. In July 1985, Albertville and Barfield each applied for a Certificate of Need (CON) to construct new nursing home facilities and to relocate their beds and services to the new facilities. In August 1985 Albertville and Barfield were each issued a CON, and in 1986 they moved into their new facilities. Thereafter, Clark applied to

the Alabama Department of Public Health for a license to operate nursing homes in his facilities vacated by Albertville and Barfield. The Department denied Clark's request because he did not have a CON authorization for any beds in either.

In February 1986, Clark filed a lawsuit in the United States District Court for the Middle District of Alabama against Albertville; Barfield; Derrell O. Fancher, the director of the State Health Planning and Development Agency; the State Health Planning and Development Agency (SHPDA); and numerous state officials, alleging that all of the defendants had conspired to deprive him of his property rights in the nursing homes in Albertville and Guntersville, in violation of the due process clause enforced by 42 U.S.C. § 1983. Clark subsequently amended his complaint to allege that the defendants had entered into a racketeering enterprise with the goal and effect of depriving him of his property interest and in doing so had acted in violation of the Racketeer Influenced and Corrupted Organization Act (RICO), 18 U.S.C. §§ 1961-1968.

On April 9, 1991, United States District Judge Myron Thompson entered a judgment in favor of Clark and against only SHPDA on his § 1983 claim for its failure to give him notice of the hearing regarding the transfer of beds and services from his facilities to other facilities. Judge Thompson ordered SHPDA to provide a hearing within 45 days with regard to the transfer of the beds and services from Clark's two nursing home facilities and to reconsider de novo the transfer of the beds and services in light of any evidence Clark might present.

On May 7, 1991, Judge Thompson entered an order clarifying his decision, at the request of SHPDA, holding that if Clark requested a "contested case" hearing then his case should

be heard by an administrative law judge and that otherwise his case should be heard by the SHPDA CON Review Board.

On June 19, 20, 21, 25, 26, 27, and 28, 1991, hearings on the applications of Albertville and Barfield for CONs were conducted by Mark D. Wilkerson, the appointed administrative law judge, pursuant to the Contested Case provisions of the Alabama Administrative Procedure Act, § 41-22-1 et seq., Ala. Code 1975. The record indicates that the administrative law judge issued a recommended order to the SHPDA CON Review Board. On August 26, 1991, the SHPDA CON Review Board held a hearing on the CON applications of Albertville and Barfield. On that same day, the SHPDA CON Review Board issued a 60-page final order, granting the CON applications of Albertville and Barfield.

On September 26, 1991, Clark filed a request for a "fair hearing review" with the SHPDA CON Review Board. On October 26, 1991, Clark filed a petition for judicial review in the Montgomery County Circuit Court, naming Derrell O. Fancher, SHPDA, Albertville, and Barfield as defendants.

On November 12, 1991, Clark filed an emergency motion for temporary and permanent injunctive relief and a motion for a show cause hearing in the United States District Court for the Middle District of Alabama. Clark requested that the United States District Court enter a temporary restraining order against SHPDA, prohibiting it from conducting any "fair hearings," and requested that the court enter permanent injunctive relief declaring the SHPDA CON Review Board's decision contrary to that court's prior orders. Clark also requested that the district court remand the case to SHPDA and the administrative law judge for them to define Clark's CON rights. On November 14,

1992, Judge Thompson held a hearing on Clark's emergency motion. That same day, Judge Thompson entered an order denying Clark's emergency motion. Judge Thompson held that SHPDA had fully and completely complied with the remedial orders of the court.

On November 15, 1991, a hearing was held before the fair hearing officer, Mark G. Montiel. On November 27, 1991, the fair hearing officer issued a final order, approving and affirming the SHPDA order, finding that SHPDA did not act in an arbitrary or capricious manner without reasonable justification for its decision.

On December 6, 1991, SHPDA filed a motion to dismiss Clark's petition for judicial review on the ground that the SHPDA order had not become a final decision until November 27, 1991, and therefore, Clark had filed his petition for judicial review prematurely. The record indicates that at the same time Clark also filed a petition for judicial review in the Marshall County Circuit Court.

On December 20, 1991, Clark refiled his notice of appeal with the SHPDA CON Review Board. That same day, Clark refiled his petition for judicial review in the Montgomery County Circuit Court. On December 27, 1991, Albertville and Barfield filed a motion to require Clark to select under which statute he was appealing and to which court he was appealing. Albertville and Barfield alleged that Clark had refiled a petition for judicial review in both the Montgomery County Circuit Court and the Marshall County Circuit Court pursuant to both the Alabama Administrative Procedure Act (AAPA), § 41-22-20 et seq., Ala. Code 1975, and the CON statute, § 22-21-260 et seq., Ala. Code 1975.

Appendix D

On January 3, 1992, Ozettia Gilliland, Ruby Kimberly, Jessie Sims, Dora Stephens, James Thompson, Alma Walls, Nell Boach, Opal Dobbins, Allie Garrett, Anna Hunt, Margaret Johnston, Winifred McVeigh, Sara Smith, and Alta Mae Williams (Residents), residents and patients in the nursing homes in Albertville and Guntersville, filed a petition to intervene in the case.

On January 8, 1992, the trial court entered an order, dismissing Clark's October 24, 1991, petition for judicial review and his original notice of appeal. The trial court found that it had jurisdiction of the cause pursuant "to the AAPA because Clark was not an 'applicant' in the administrative proceeding." On January 17, 1992, the trial court granted the Residents' motion to intervene.

On February 7, 1992, Clark's Marshall County action was transferred to the Montgomery County Circuit Court. On October 13, 1992, Clark filed a motion to consolidate his actions, which was subsequently granted.

On June 18, 1993, the trial court entered a judgment, affirming the decision of SHPDA. On July 16, 1993, Clark filed a motion to alter, amend, or vacate the June 18, 1993, judgment. On September 7, 1993, the trial court denied Clark's motion to alter, amend, or vacate its judgment.

Clark appeals, raising two issues; (1) whether the trial court erred in affirming the decision of the SHPDA CON Review Board and (2) whether the trial court erred in denying his motion to alter, amend, or vacate its judgment of June 18, 1993.

Judicial review of an agency decision is limited by § 41-22-20(k), Ala. Code 1975, which provides in part:

Appendix D

> "Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. . . ."

Further, this court reviews the judgment of the trial court " 'without any presumption of correctness, since [that] court was in no better position to review the order of the Board than we are.' " *Nursing Home of Dothan, Inc. v. Alabama State Health Planning & Development Agency*, 542 So. 2d 935, 938 (Ala. Civ. App. 1988), *quoting Regional Dialysis v. Northeast Alabama Kidney Clinic, Inc.*, 480 So. 2d 1226 (Ala. Civ. App.), *cert. denied*, 480 So. 2d 1229 (Ala. 1985). A reviewing court may not substitute its judgment as to the weight of the evidence on questions of fact, and the agency's decision is to be upheld unless it is unreasonable, arbitrary, or capricious. *Montgomery Rehabilitation Hospital, Inc. v. State Health Planning Agency*, 610 So. 2d 403 (Ala. Civ. App. 1992).

Clark argues that the decisions of the SHPDA CON Review Board and the fair hearing officer were arbitrary and capricious. Clark claims that the SHPDA CON Review Board, the fair hearing officer, and the trial court ignored or misconstrued significant factual information.

The record reveals that before 1976 Clark operated the nursing home in the Albertville facility and that his license to operate the nursing home was revoked; however, Clark's license was later reinstated. The record also reveals that in 1976 the State intended to revoke Clark's license again and to close his nursing

home because of what it found to be unsanitary, unsafe, unacceptable, and intolerable conditions. The record further reveals that in an attempt to keep the facility open, Clark agreed not to operate the nursing home business and to lease his building to Albertville.

Further, the record reveals that Clark constructed a nursing home facility in the Claysville-Guntersville area after being denied an "Assurance of Need" certificate by the Alabama Committee of Public Health. The record also reveals that in July 1978, before the completion of the nursing home facility, Clark entered into a lease of the facility with Claysville-Guntersville Nursing Home, Inc. The record reflects that Clark represented to Claysville-Guntersville Nursing Home, Inc., that he had an Assurance Of Need (AON) certificate on the facility; this representation subsequently led to a lawsuit and a settlement. The record also reflects that in August 1979 Brooks Barfield purchased all of the stock of Claysville-Guntersville Nursing Home, Inc. The record further reflects that Brooks Barfield incorporated Barfield Health Care, Inc., to operate and provide nursing home services at the Claysville-Guntersville facility.

The record reflects that in 1985 Albertville and Barfield each filed an emergency application for a CON for the construction of a new facility and the relocation of the same number of beds that they had been operating. In support of their applications, Albertville and Barfield listed numerous alleged deficiencies in the current buildings they were leasing from Clark. Section 22-21-275(14), Ala. Code 1975, provides that the decision of the fair hearing officer "shall be considered the final decision of the state agency" for the purposes of judicial review. *See also Methodist Homes for the Aging v. Stewart,* 594 So. 2d 161 (Ala. Civ. App. 1992). The fair hearing officer adopted by reference the findings

of fact and conclusion of law in the SHPA CON Review Board's order of August 26, 1991. The fair hearing officer found that the applications of Albertville and Barfield met "the required findings of § 22-21-266, Ala. Code 1975, with respect to in-patient facilities or services and that the applications [were] consistent with each of the applicable criteria and standards set forth in Chapter 6 of the SHPDA Rules" and the appropriate State plan. The Fair Hearing officer also found that SHPDA had not acted in an arbitrary or capricious manner and that it did not abuse its discretion in deciding that the applications of Albertville and Barfield should be granted.

The SHPDA CON Review Board record contains almost 1930 pages of transcribed testimony and 500 exhibits. There was extensive testimony regarding the condition of the nursing home facilities in 1985, testimony regarding Clark's refusal to repair or correct structural defects and conditions affecting the health and safety of the residents of the nursing homes, and the estimated thousands of dollars that it would have cost for the necessary repairs.

The SHPDA CON Review Board found that the correction of the deficient conditions was primarily the responsibility of Clark, and that he was unwilling to make the repairs and improvements to protect the health and safety of the residents of the facilities. The SHPDA CON Review Board further found that the deficient conditions "were not reasonably 'foreseeable' within the context of the emergency review provision and constituted [an] 'emergency' for the purposes of the CON statute, the 1985 SHPDA *Rules and Regulations* and the executive moratorium." The SHPDA CON Review Board held that Albertville and Barfield were the holders of a superior "grandfathered" CON interest in the operation of the nursing

home beds and the nursing home services located in, and provided by, the nursing home facilities owned by Clark before and after July 30, 1979.

We find that the SHPDA CON Review Board acted within its authority to grant CONs to Albertville and Barfield and that its decision and the decision of the fair hearing officer are supported by substantial evidence. *See Nursing Home of Dothan, supra.* Therefore, the trial court did not abuse its discretion by affirming the decision of the SHPDA CON Review Board or by denying Clark's motion to alter, amend, or vacate.

The judgment of the trial court is affirmed.

AFFIRMED.

Thigpen and Yates, JJ., concur

I, John H. Wilkerson, Jr., Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said court. Witness my hand this 17th day of June, 1994.
s/ John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals of Alabama

APPENDIX E — FINAL DECREE FILED JUNE 18, 1993

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

Civil Action # CV-91-2347G

E. L. CLARK

Plaintiff

vs.

DERRELL O. FANCHER, et als

Defendants

FINAL DECREE

E. L. Clark, pursuant to provisions of the Alabama Administrative Procedure Act, CON Law, and State Health Planning Agency Rules and Regulations, filed in the Montgomery County Circuit Court a petition for review of the administrative action of SHPA adverse to the interests of the petitioner. The petition was contested by the Agency and the beneficiaries of the favorable ruling, Albertville Nursing Home and Barfield Health Care.

I have carefully reviewed the voluminous record in this cause together with the briefs, counter briefs, memoranda, letters, and reply letters of the very able attorneys involved.

It is my opinion that there was substantial evidence to support the ruling of the State Health Planning Agency and the Board correctly applied the law to the facts.

Appendix E

The decision of the State Health Planning Agency is due to be and is hereby affirmed.

Done this 18th day of June, 1993.

s/ William I. Byrd
William I. Byrd
Circuit Judge
176 Bay View Drive
Daphne, Alabama 36526
205-626-6857

APPENDIX F — ORDER OF THE STATE HEALTH PLANNING AND DEVELOPMENT AGENCY OF THE STATE OF ALABAMA DATED NOVEMBER 27, 1991

BEFORE THE STATE HEALTH PLANNING AND DEVELPMENT AGENCY OF THE STATE OF ALABAMA

ALBERTVILLE NURSING HOME, INC.
Albertville, Alabama — Project No. AL-5046-E

BARFIED HEALTH CARE, INC.
Guntersville, Alabama — Project No. AL-5047-E

FINAL ORDER OF FAIR HEARING OFFICER

This cause came on for hearing on November 15, 1991, pursuant to request for fair hearing filed by the requestor, E.L. Clark. By agreement of the parties, the fair hearing was conducted on the Record and the argument of counsel for the parties. The undersigned Fair Hearing Officer having now received and carefully considered all of the relevant testimony and evidence in the Record of the contested case proceedings and the public hearing before the State Health Planning and Development Agency Certificate of Need Review Board ("SPDA"), along with the arguments from counsel for the parties, and being of the opinion that this Final Order should be issued, it is, accordingly, the Final Order of the Fair Hearing Officer in these causes as follows:

FINDINGS OF FACT AND CONCUSIONS OF AW

The Findings of Fact and Conclusions of Law contained in the Final Order On Contested Case Proceeding issued by SPDA on August 26, 1991 (SHPDA Order"), are hereby adopted by

reference as the Findings of Fact and Conclusions of Law of the Fair Hearing Officer hereby found and concluded that said Findings of Fact and Conclusions of Law are supported by the Record and that they are correct and proper under the relevant testimony and evidence in the Record.

It is further found, concluded and ordered that the Applications herein meet the required findings of § 22-21-266, Ala. Code (1975), with respect to in-patient facilities or services and that the applications are consistent with each of the applicable criteria and standards set forth in Chapter 6 of the SHPDA Rules and that the applications are consistent with the appropriate State Plan. SHPDA did not act in an arbitrary or capricious manner without a reasonable justification for its decision, and its decision was not absent fixed standards against which the applications were measured. SHPDA did not abuse its dicretion in deciding that the Albertville and Barfield applications should be granted. SHPDA did not materially fail to follow review procedures set out in the SHPDA rules. There is no error in the SHPDA Final Order.

Accordingly, IT IS ORDERED that the SHPDA Order be and the same is hereby APPROVED AND AFFIRMED.

It is further ORDERED that Project No. AL-5046-E, Albertville Nursing Home, Inc. (Albertville) is hereby GRANTED and that Project No. AL-5047-E, Barfield Health Care, Inc. (Barfield) is hereby GRANTED. The Emergency Applications for Relocation Certificates of Need filed by Albertville and Barfield are GRANTED, and said Certificates of Need shall be issued by SHPDA to Albertville and Barfield in accordance with Rule 410-1-8-.27 as soon as practicable after the date of this Final Order.

Appendix F

DONE this the 27th day of November, 1991.

s/ Mark G. Montiel
MARK G. MONTIEL
FAIR HEARING OFFICER

APPENDIX G — ORDER OF THE STATE HEALTH PLANNING AGENCY DATED AUGUST 26, 1991

BEFORE THE STATE HEALTH PLANNING AGENCY
OF THE STATE OF ALABAMA
CERTIFICATE OF NEED REVIEW BOARD

IN RE:

ALBERTVILLE NURSING HOME, INC.
Albertville, Alabama PROJECT NO. AL-5046-E

BARFIELD HEALTHCARE, INC.
Guntersville, Alabama PROJECT NO. AL-5047-E

FINAL ORDER ON CONTESTED CASE PROCEEDING

THIS CAUSE having come on for hearing pursuant to the remand Order of the U.S. District Court in the case of E.L. Clark, et al. v. Derrill Crowe, et al, Civ. Action No. 86-T-139-N (N.D. Ala) and the "contested case" provisions of the Alabama Administrative Procedure Act, §§41-22-1 *et seq. Code of Alabama 1975* ("the AAPA"), and the Certificate of Need Review Board having first received and carefully considered all of the relevant testimony and evidence from the parties, along with arguments from the parties or their counsel of record, not being of the opinion that this Final Order should be issued by the Certificate of Need Review Board ("the Board") of the State Health Planning and Development Agency (SHPDA), it is, accordingly, the

FINAL ORDER of the Board in this contested case, and the Findings of Fact and Conclusions of Law of the Board as set out herein.

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The Board, having first considered the contents of the official SHPDA files dealing with each of the above referenced Certificate of Need Applications; the transcript of the contested case proceedings; the Recommended Order of the Hearing Officer Mark D. Wilkerson. and the proposed Orders of E.L. Clark. Albertville Nursing Home, Barfield Healthcare, Inc., and the Intervenors, and the briefs and all arguments that may have been filed or presented by any adversely affected party, and oral arguments presented at the Board meeting on August 26, 1991, does hereby adopt and issue this Final Order in this contested case. This Final Order is issued after the members of the Board voted unanimously on the content of and, the disposition affected by, this Final Order on August 26, 1991. Moreover, this Final Order is made and issued in strict conformity and compliance with the provisions of *Ala. Code* §§41-22-15 and 41-22-16 (1975); the Alabama "Certificate of Need Law", *Ala. Code* §22-21-260 *et. seq* (1975) and the SHPDA Rules and Regulations.

I.

A. Introduction

On July 29, 1985, Albertville Nursing Home, Inc. ("Albertville"), through letter from its counsel, requested that the CON Board consider an emergency application on its behalf to construct a new nursing home facility with a complement of 133 beds in Albertville, Alabama. In its letter, Albertville indicates that it wishes to operate *"the same 133 beds it has operated in the past"*. A projected cost of two million five hundred thousand dollars ($2,500,000) was given for the proposed facility. In support for its request for emergency consideration, the letter cites a long list of alleged deficiencies in the current building utilized by Albertville, which was owned by Mr. E.L. Clark ("Clark").

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On July 23, 1985, Barfield Healthcare, Inc., ("Barfield"), through letter from its counsel, requested that the CON Board consider an emergency application for the construction of a new nursing home facility with a complement of 103 beds in Marshall County, Alabama. In its letter seeing consideration of an emergency CON, Barfield indicates that it wishes to *"operate the same 103 beds it had operated in the past"*. A projected cost of one million nine hundred thousand dollars ($1,900,000) was given for the proposed facility. In support of its request for emergency consideration, the letter cites a long list of alleged deficiencies in the current building being utilized by Barfield, which was also owned by Clark.

The aforementioned applications were ultimately granted by the CON Board on October 16, 1985. The circumstances surrounding the filing, consideration and approval of the applications has served as the basis for protracted litigation involving Albertville, Barfield, Clark and other parties. *E.L. Clark. et. al. v. Derrill Crowe, et al.*, Civ. Action No. 86-T-139-N (N.D. Ala.) This litigation is described in greater detail below. As a result of this litigation, the United States District Court for the Middle District of Alabama issued an Order dated April 9, 1991, essentially remanding the applications to the CON Board for a *de novo* hearing, almost five years after the applications were originally filed. Pursuant to the April 9, 1991 Order, the parties agreed that the aforementioned applications should be heard on a consolidated basis and should be conducted pursuant to the *"contested case"* provisions of the Alabama Administrative Procedure Act, *Ala. Code* §§42-22-1 et seq. (1975) (the "AAPA"). It was further determined and agreed by the parties that the duly appointed hearing officer was an appropriate person to conduct the hearing and to therefore issue a recommended order to the Board.

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Hearings were conducted before the hearing officer on June 19, 20, 21, 25, 26, 27 and 28, 1991 at the SHPDA Conference Room at 312 Montgomery Street, Montgomery, Alabama.[1] At the hearing, the following parties appeared in person or through their counsel: Albertville and its President, Ms. Audrey Cole ("Cole"); Barfield and its President, Brooks Barfield; various intervenor patients currently residing in facilities operated by Albertville and Barfield; E.L. Clark; and intervenor Resolution Trust Corporation ("RTC"). Twenty-four witnesses testified in the hearing and over five hundred (500) exhibits were submitted by the parties, some of which were not admitted.[2]

At the conclusion of the hearing, the parties agreed that this matter would be submitted to the Board for initial consideration at it regular August meeting. The parties stipulated to a procedure by which briefs in the form of proposed orders would be submitted to the hearing officer by July 17, 1991 and the hearing officer would then issue a recommended order to the Board for consideration at the August meeting. In light of the fact that the proposed orders submitted by each party were submitted to the Board contemporaneously with the hearing officer's recommended order, the parties also agreed to waive their right to the filing of any exceptions to the recommended order. However, Clark and RTC were nevertheless allowed to file written

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1. Prior to the hearing, the hearing officer issued a Notice of Hearing, Amended Notice of Hearing and a Prehearing Order which are all attached hereto as Appendix A, B, and C.

2. In each instance in which exhibits were excluded, the sponsoring party was permitted to make a showing based on the proffered exhibits, in accordance with the AAPA. In addition, where testimony was excluded by the hearing officer, the parties were given an opportunity to make a showing summarizing the excluded testimony.

responses by 5:00 p.m. Wednesday, August 21, 1991, which responses were made a part of the record.

In its consideration of the aforementioned applications, the CONRB has carefully examined, among other things, the federal court orders, applicable federal and state law and regulations, the relationship of the parties and the conditions at the Albertville and Guntersville facilities as reflected in the testimony and evidence of record. The Findings of Fact and Conclusions of Law regarding the aforementioned applications are set out below.

B. Federal Court Order

This case is being heard under the auspices of an Order dated April 9, 1991 by United States District Judge Myron Thompson in the case of *E.L. Clark. et al. v Derrill Crowe, et al.*, Civil Action No. 86-T-139-N. These underlying legal proceedings and the findings of Judge Thompson have a direct bearing on many of the issues before the CON Board.

In February of 1986, Clark filed a lawsuit in Federal District Court, claiming that certain state officials, acting together with private individuals, including Barfield and Cole, engaged in a conspiracy to deprive him of certain property rights related to the Albertville and Guntersville nursing homes. (April 9, 1991 Order, p. 7) The Complaint was later amended to challenge the adequacy of the emergency procedures by which the CONs had been acquired and to allege that SHPDA's award of the bed authority in the respective proceedings was arbitrary and capricious. In addition, Clark claimed that the defendants' acts resulted in a civil violation of the Racketeer Influenced and Corrupted Organizations Act ("RICO"), 18 U.S.C.A. §§1961-1968 (West 1984 and Supp. 1990).

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In the April 9, 1991 Order, the court granted judgement in favor of Clark in regard to his 1983 claim, finding that the failure to give Clark notice of the proposed transfer of beds and services from the nursing homes in 1985 *"violated the due process clause of the 14th Amendment to the U.S. Constitution as of course 42 U.S.C. Section 1983"*. Accordingly, the court enjoined the defendants, *"their officers, agents, servants, employees and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise"* from failing to provide Clark with a new administrative hearing in regard to the above applications in which SHPDA was ordered to *"reconsider de novo the transfer of the beds and services in light of any appropriate comments and evidence plaintiff Clark might present. . ."*. (April 9, 1991 Order, p. 17) The court ruled in favor of the defendants in regard to Clark's allegations that SHPDA's decision to grant the applications was *"arbitrary and capricious"*, holding that it did not agree with Clark that, upon remand, the CON Board *"could find in his favor only"*. (April 9, 1991 Order, p. 16) The April 9, 1991 Order did not address Clark's RICO claims. The court also denied certain claims of plaintiff-intervenor City Federal Savings & Loan Association (later replaced in the litigation by RTC), finding that it had no property interest in the CON authority associated with the Albertville and Guntersville facilities.

The April 9, 1991 Order was the subject of subsequent reconsideration motions filed on behalf of Clark and RTC. The Clark motion sought an order restricting the evidence that may be considered by the CON Board for purposes of this *de novo* hearing. The court denied the motion, stating:

"The State Health Planning and

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> ***Development Agency (SHPDA) may receive any evidence necessary for its decision, and this evidence may come from any source, including but not limited to plaintiff Clark and defendants Cole and Barfield. The issue of what evidence the agency may receive is a matter for the agency and not this court. However, Cole and Barfield should not be advantaged in any way by the fact that they had use of the 'beds' since the agency's original decision allowing the transfer of the beds."***

In regard to RTC's motion, the court reaffirmed its prior determination that RTC did not hold a property interest in the bed authority, despite the mortgage and assignment of the leases, citing the non-assignability of CONs under *Ala. Code* § 22-21-270 (e)(1975).

The parties differ on the limitations placed on the CON Board by virtue of the aforementioned orders and have submitted, both orally and in writing, various motions seeking to limit or expand the evidence that may be considered by the CON Board in the current *de novo* hearing. In response to various motions filed by the parties, the hearing officer determined that the April 9, Order, read in context with Alabama law and due process considerations, requires the CON Board to apply those portions of the old 1985 *SHPDA Rules and Regulations* which affect the substantive rights of the parties, while the current SHPDA *Rules and Regulations* would be used in all other instances. In addition, the hearing officer ruled that, as a general rule, no testimony and evidence would be admitted concerning the operations of the respective applicants' facilities *since* the

date of 1985 decisions and the subsequent construction of the new facilities.[3]

The District Court's discussion of the property interest held by Clark in the CONs is of critical importance to the disposition of the present applications, in that it bears directly on the question of who was the holder of the CONs at the time the application were originally filed. In its decision, the court held that the interest of Clark (as well as the applicants) in the respective CONs was a result of the fact that the 1979 CON law applied only to new healthcare facilities and services, with persons already offering *"facilities and services"* as the date of the CON law having equivalent, *"grandfathered"* rights. Thus, by virtue of their *"grandfathered"* status, the nursing home facilities enjoyed all the rights and privileges of a "CON" even though a written CON was not required to be issued by SHPD. The court then addressed whether Clark, as opposed to the respective applicants, held the grandfathered interest in the Albertville and Guntersville facilities. In addressing this issue, the court stated in part:

> *"SHPDA argues that Clark was a simple landlord, who had at most only a property interest in the physical buildings at Albertville and Guntersville. The credible*

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3. In certain instances, the hearing officer allowed the applicants to present limited evidence regarding the new facilities in response to cross-examination by Clark's counsel. During the hearing, the hearing officer also allowed testimony concerning inspections of the Clark facilities which occurred during the general time period in which the applications were considered, even if slightly after the October, 1985 decision date, on the basis that there was no way to know exactly when the hearing would have taken place had Clark actually been given notice in 1985 and that the applicants would have been able to obtain and present expert testimony if a contested proceeding had occurred.

evidence before the court does not fully support this contention. The court agrees with Clay H. Dean, the drafter of the CON Legislation and a former director of SHPDA, that Clark leased more to Cole and Barfield than just physical plants. He leased nursing homes operations to them. Clark and his tenants agree that his tenants would continue to operate and administer nursing homes in the two facilities. An expressed condition in the lease contracts was, therefore, that the tenants would take over nursing home operations. Moreover, in one of the leases entered into by the parties, Clark leased a specific number of "beds," and calculated the rent by the number of beds in use in the building. This lease further provided that, should the tenant expand the nursing home beds in that facility, there would be a proportional increase in rent. The court agrees with Dean and finds from the evidence that Clark had a sufficient interest in the operation of the two facilities to enjoy a "grandfather status" when the CON statute went into effect in 1979 (footnote omitted). The court cannot say that his status was exclusive, however. Cole and Barfield, as operators of the two nursing homes, also had an expectation in continued operation of the two facilities when the CON law went into effect (footnote omitted).

Clark asks that the court determine who has

> ***the superior interest. The court declines the invitation. The determination turns on more than just legal principles. Whether a lessor or lessee of a nursing home operation should be considered as the superior holder of a grandfathered operation is more than likely also a matter of policy. Indeed, there was conflicting testimony before the court as to which result, in general and in this case specifically, would better further the public interests of the CON statute. SHPDA should resolve this issue, not the court."***

(April 9, 1991 Order, p. 13-15)

Thus, the District Court gave the CON Board wide latitude to determine whether Clark, as opposed to the applicants, holds the *"superior interest"* in the respective CON interests associated with the Albertville and Guntersville facilities, recognizing that the decision involves difficult legal and public policy considerations.

C. Alabama Law and the "Grandfathered" CON Rights of the Parties.

In a nutshell, Clark argues that the interests of Barfield and Cole in the respective "CONs" were, at most, limited to *"leasehold rights"*, acquired by virtue of lease agreements with the owner, Clark. Thus, Clark argues, whatever interests were held by Cole and Barfield would expire with the termination of the lease, with Clark retaining the *"permanent"* grandfathered authority. Clark asserts that it has been the historic practice of SHPDA to recognize the:

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> ***"owners of healthcare facilities, the construction and operation of which predated the advent of the Alabama CON Review Program as the persons or entities having the permanent interest in and to the facilities' "bed authority" — not the mere operators of the facilities."***

Clark proposed order, p. 21.

Cole and Barfield dispute Clarks' assertion that SHPDA has recognized the facility owners as holders of the grandfathered CONs, stating:

> ***"Throughout the years SHPDA has always dealt with the applicants and licensed operators of healthcare facilities and services — never with real estate owners who were not also operators of healthcare facilities (Tr. 706, 726, 727, 752)."***

Albertville and Barfield proposed order, p. 32. Additionally, the applicants contend that the Board should look at the ***"totality"*** of the circumstances surrounding the operation of the facilities at the time the CON statute was enacted to determine whether the lessor or lessee has the ***"superior"*** grandfathered interest. Albertville and Barfield point to the history of the respective nursing homes, the issuance of Assurance of Need certificates ("AONs") (and, in one case, a CON) and actions by Clark allegedly ***"relinquishing"*** his interest in the provision of healthcare at the facilities prior to 1979 in support of their position that they hold such ***"superior"*** interests.

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An examination of the record of this case, past correspondence and orders issued by the CON Board and SHPDA and the contradictory testimony of prior and present officials at the agency reflects the inherent difficulty in reaching a resolution as to whether, as a general rule, the *"owners"* or *"lessee-operators"* of healthcare facilities obtained superior *"grandfathered"* CON interests in 1979. As is shown below, it is clear that SHPDA's historic *"policy"* in regard to this issue, if one ever existed, was subject to varying interpretations and was, in some respects, self-contradictory.

The parties presented several witnesses who testified as to the prior policy and practice of SHPDA in regard to *"grandfathered"* facilities. Mr. Alan Koch, who served as the initial Executive Director of SHPDA in 1979, testified on behalf of the applicants. Mr. Koch explained that the Section 112 (AON) program dealt strictly with Medicare and Medicaid reimbursement of capital expenditures. (Tr. 583) He agreed with other witnesses that the AON program was similar to the subsequent CON program in that the issuance of an AON was tied to the established need for health facilities and services, as reflected in what was then referred to as the State Comprehensive Health Plan (see also, deposition of Clay H. Dean and related exhibits, Clark ex. 282 and 283). The AON program became effective in Alabama in September of 1973. Healthcare facilities and services in existence prior to implementation of the program were *"grandfathered"* for Section 1122 purposes. (Clark ex. 282, p. 32)

The significant difference between the AON and CON programs was in the sanctions involved. (See testimony of C. Stewart, Tr. 1712; Koch, Tr. 583; Clark Ex. 282, p. 32) The AON program was concerned only with capital reimbursement and the

withholding of such reimbursement was the only penalty for non-compliance. As reflected in the testimony of Koch, Stewart and Dean, prior to the CON statute any person could operate a nursing home in Alabama, as long as licensure standards were met. In contrast, with implementation of the CON statute, no person could operate a nursing home in Alabama without receiving a CON unless he fell under one of two narrow exceptions[4]: (1) he held a valid AON as of the effective date of the CON program;[5] or (2) he was operating a healthcare facility which had been constructed and was operating as of the effective date of the CON program in 1979.

In the case of the Guntersville facility, Koch pointed out that neither Clark nor Barfield held an AON at the time of the effective date of the CON law. Accordingly, Koch testified that as Executive Director he initially refused to agree to a request by Barfield for a written CON, although he informed Barfield that he could continue to operate, without reimbursement, due to his *"grandfathered"* status. (Tr. 585, 96) He testified that Barfield then obtained an Attorney General opinion, stating that he was eligible to receive a CON. (See Clark Ex. 146; discussed below; Tr. 586) Based on this opinion, a CON was issued to Claysville-Guntersville Nursing Home, Inc. on August 18, 1980. Nevertheless, Medicaid reimbursement was still not granted, prompting Barfield to ultimately create a new company, Barfield Healthcare, Inc., to operate as a sublessee with Claysville-

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4. A nursing home must still receive a license from the Department of Public Health to operate.

5. In regard to the conversion of AONs to CONs under *Ala. Code* § 22-21-265 (1975), state law required the holder of an AON to file for an application for a replacement CON within 90 days after July 30, 1979. Thus, the automatic "conversion" of AONs to CONs is not applicable to the Albertville situation.

Guntersville Nursing Home, Inc. The creation of the new corporation apparently resulted in Medicaid reimbursement.

Mr. Koch testified that it was his view that Clark's lease of the Guntersville facility to Claysville-Guntersville Nursing Home, Inc., provided for the lease of only the building, not any nursing home rights or authority, in that at the time of execution of the lease anyone could construct and operate a nursing home, as long as licensure requirements were met.[6] Thus, according to Koch, Clark held no special nursing home *"authority"* that Claysville-Guntersville Nursing Home, Inc., Barfield, or anyone else, could utilize through a lease agreement. In light of the fact that there was no pre-existing authority, it was Koch's opinion that SHPDA was free to apply equitable principles in determining who had the *"grandfathered"* interest. Mr. Koch was of the view that the CON status logically and equitably attached to the beds, therefore, the operator of the beds, who he described as Barfield, received the *"grandfathered"* interest.

Ms. Peggy Schmitz also testified regarding the policies and practices of SHPDA. Ms. Schmitz is an Assistant Attorney General who served from 1984 to 1987 as SHPDA counsel. She questioned the viability of the grandfather clause in the *1979 SHPDA Rules and Regulations* due to what she considered to be a lack of specific legislative authorization for such clause. (Tr. 461, 2) Nevertheless, she testified that the Attorney General's office had advised SHPDA that if a facility was operating in 1979 when the law became effective it could continue to operate without

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6. Mr. Koch's testimony in this regard is contrary to the finding of the District Court's April 9, 1991 Order, p. 14. The CON Board has not given any weight to this or any other "legal" opinion expressed by Koch or others, however, and has considered their testimony only for purposes of determining the policy and practices of SHPDA and the history of the Albertville and Guntersville operations.

obtaining a written CON. (Tr. 474) In regard to home health agencies, the CON Board adopted a policy that such agencies could continue to operate in the areas they were operating as of the effective date of the CON law, however, they would require a CON for any expansion into other areas of the state. (Tr. 474)

Ms. Schmitz testified that in her experience with relocation applications, SHPDA traditionally looked only at the lessee — operators of healthcare facilities as holding the *"grandfathered"* interest. She stated that during her tenure at SHPDA, she was not aware of any requirement or practice that the agency provide notice of such applications to the landlords of such lessee-operator.[7]

The testimony of Eugene Watson was generally supportive of that of the testimony of Mr. Koch and Ms. Schmitz in regard to the prior practices and policies of SHPDA in this area. Mr. Watson was employed as a Special Assistant Attorney General who served as *"agency counsel"* to SHPDA from January, 1984 through October, 1986. He worked cooperatively with Ms. Schmitz in that capacity, handling much of the administrative legal functions at the agency. (Tr. 901) One of his primary functions was to update the 1979 SHPDA Rules and Regulations in light of the subsequent adoption of the AAPA, the 1982 amendments to the CON law, and Public Law 96-79 on a federal level. (Tr. 903). The revised SHPDA Rules and Regulations became effective on March 21, 1985. (Tr. 905)

Mr. Watson agreed with Ms. Schmitz that the original CON statute did not contain a *"grandfather clause in the classic*

7. Apparently, the issue only arose in regard to home health agencies, for which no AONs were issued and which involved county territorial authority, as opposed to traditional *"bed authority"*.

legislative sense". He also indicated that it was his practice to consider the lessees-operator the holder of any grandfathered interest that might exist. However, he is aware of no instance prior to adoption of the new rules in March of 1985 where any entity, other than home health agencies, claimed "***grandfathered***" rights. (Tr. 909, 910)[8]

According to Mr. Watson, other health related governmental agencies also looked at the operators, as opposed to the owners, of healthcare facilities as the responsible parties. As an example, he cited the fact that the "***Directory of Home Healthcare Facilities***" published by the Alabama Department of Public Health listed Claysville-Guntersville Nursing Home, Inc., as the operator and the licensee at the Guntersville site, and Albertville Nursing Home, Inc., as the operator and licensee of the Albertville site in 1979. (Tr. 916) Beginning in 1982, the directory listed Barfield Healthcare, Inc., as the operator and licensee at Guntersville. (Tr. 916)

Clark presented the deposition testimony of Clay H. Dean, concerning the historic practices of SHPDA in this area (Clark ex. 282) Mr. Dean was director of the State Health Planning and Developing Agency from 1977 through 1979, when it was still a part of the State Health Department. He retired the day before SHPDA became an independent agency. (Clark Ex. 282, p. 13) He assisted in drafting the original CON law. (Clark Ex. 282, p. 24) He testified that the CON law took effect on July 31, 1979, with the implementation regulations becoming effective on November 1, 1979.

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8. Watson pointed out that "***home health services***" are included in the definition of "***health care facility***" in *Ala. Code* § 22-21-260(1975), even though by definition such operations do not involve "***beds***". (Tr. 906, 949)

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Mr. Dean testified that Clark, by virtue of his ownership of the Guntersville and Albertville facility, could continue to *"offer"* . . . *"whatever services [he] had in existence on that day"* just like every other healthcare facility, such as the *"University of Alabama Hospital, Baptist Memorial or Baptist Hospital"*. (Tr. 102) He makes a distinction between *"operating"* a healthcare facility and *"offering"* a healthcare service, stating that the CON statute does not apply to the operation of a facility, but simply grants a right to *"prepare yourself to offer"* healthcare services. The State Department of Public Health, according to Mr. Dean, is the sole agency in Alabama that can authorize the actual operation of a healthcare facility. He further testified that, in his view, there were two types of *"grandfathered"* CON authority associated with the Albertville and Guntersville facilities. The first was Mr. Clark's original *"grandfathered"* status as the owner of the property and, second, Albertville and Barfield's *"grandfathered"* . . . *"leasehold authority"*. (Tr. 105,106)

While each of the present and former state officials who testified on behalf of the parties are recognized experts in their fields, their testimony ultimately served to underline the fact that SHPDA never developed a firm policy regarding the recognition of *"grandfathered"* CON rights. In all other relocation applications cited by the parties, SHPDA was provided notice of the concurrence or acceptance of the owner of the facility to the relocation or transfer request.[9] Alan Koch, while stating that as a matter of policy the lessee-operator of a nursing home as of the effective date of the CON program in 1979 obtained the *"grandfathered"* CON rights, also testified that, upon the

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9. See application of Lamar Convalescent Center. (Clark Exhibits 80 and 90; T. 763-765); and correspondence regarding purchase of John Andrew Community Hospital in Tuskegee. Alabama (Clark Exhibit 121)

expiration of the lease, the CON rights would transfer to a subsequent lessee by virtue of his lease with the lessor, notwithstanding his testimony that the original operator-lessee held the grandfathered rights and no CON interest may be transferred or assigned without CON Board approval. (Tr. 625-627) The inconsistency of such a policy is apparent.

It is equally clear, however, that SHPDA has not consistently recognized the true *"owners"* of healthcare facilities as the recipients of *"grandfathered"* rights.[10] The Board takes administrative notice that a great many healthcare facilities in Alabama are actually owned by medical clinic boards and authorities, a fact that was recognized by Mr. Dean. There is no record of SHPDA or the CON Board ever receiving the consent of such authorities for the relocation or transfer of CON bed authority prior to 1985. When questioned about this apparent contradiction, Mr. Stewart testified that it had been the agencies practice to view medical clinic boards as simply a financing vehicle. (Tr. 1795)

Based on the testimony of past and present SHPDA officers, coupled with the records of prior agency actions, the CON Board finds that there has been no consistent, historic practice regarding whether the *"owners"* as opposed to *"lessee-operators"* of healthcare facilities received the *"superior" "grandfathered"* interests as defined in the April 9, 1991 Order of the District Court. The CON Board agrees with the applicants that this determination must be made on a case-by-case basis, considering the *"totality"* of circumstances.

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10. When questioned about the situation involving Dalraida Nursing Home, Charlie Stewart was unable to testify whether the true owner of the Dalraida facility was Mr. Easterwood or the *"Medical Clinic Board of the City of Montgomery"*. (Tr. 1788)

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In regard to the Albertville facility, the circumstances leading up to the lease of the facility by Clark to Albertville Nursing Home, Inc., and Audrey B. Cole on December 8, 1976 is chronicled on pages twenty through twenty-seven below. Incorporating the findings contained therein, the CON Board is of the opinion and finds that it was the intention of the parties for Mr. Clark to discontinue holding himself out to be in the nursing home business, particularly in regard to governmental agencies, and for Albertville and its President, Cole to assume responsibility for the various terms and conditions upon which such nursing home services must be provided, notwithstanding that the rent was tied to the number of nursing home beds and that the lease required the lessees to comply with all state and federal laws and regulations and to provide the owner with a copy of all inspection reports. As such, it is the opinion of the CON Board that Albertville held the *"superior" "grandfathered"* interest which, under state law and the then effective SHPDA *Rules and Regulations,* gave it the right to seek a CON authorizing the transfer or relocation of such beds.

In regard to the Guntersville facility, the circumstances leading up to the lease of the Guntersville facility by Clark to Claysville-Guntersville Nursing Home, Inc. is found on pages thirty-eight through fifty below. Incorporating the findings contained therein, the CON Board is of the opinion and finds that Claysville-Guntersville Nursing Home, Inc., held the "*superior*" "*grandfathered*" interest in the Guntersville facility, notwithstanding the fact that the effective lease between the parties contained much of the same language found in the Albertville lease. The CON Board also finds that Barfield, the stated applicant in the present proceeding, is under common ownership with Claysville-Guntersville Nursing Home, Inc. and is the successor in rights to that certain lease executed between

Claysville-Guntersville Nursing Home, Inc. and Clark.[11] To the extent that approval of the CON Board is required for the transfer of CON rights from Claysville-Guntersville Nursing Home, Inc. to Barfield, such approval is hereby granted as part of the CON Board's disposition of these applications.

A determination of which of the respective parties held the *"superior" "grandfathered"* interest is not, however, dispositive of the aforementioned applications. The applicants are still required to meet the requirements existing at the time the applications were filed for consideration of such applications and the statutory criteria for approval thereof

D. *"Emergency"* Application Procedures

Alabama law and SHPDA regulations provide for a truncated procedure for the granting of an *"Emergency Certificate of Need"* to approve capital expenditures *"made necessary by unforeseen events which endanger the health and safety of the patient". Ala. Code* §22-21-268(1975). §410-1-10-.01 of the SHPDA *Rules and Regulations,* 1985 provides that if an emergency exists that the agency's Executive Director may issue a CON, which must be ratified by the CON Board at the next regularly scheduled meeting. Failure to ratify the emergency CON renders such certificate null and void. No extensions of certificates granted under this abbreviated procedure may be granted. See §410-1-.01(e) of the AAPA.

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11. Although the agreement between Barfield and Clarksville-Guntersville Nursing Home, Inc. found in B/C 45 is titled a "sublease", it also contains language which is more in the form of an assignment. On June 24, 1981, Clark provided his written consent to "the transferring, assigning or subletting" of such lease from Claysville-Guntersville Nursing Home, Inc. to Barfield.

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Unfortunately, at the time the two applications were filed, this administrative procedure was not being followed. Instead, the CON Board had developed a *"policy"* of having applications filed under the emergency provisions reviewed by an *ad hoc* committee, to determine if they should be submitted to the CON Board at its next meeting. This procedure was apparently followed in regard to the Albertville and Barfield applications. According to the Honorable Michael Emfinger, who was then the Executive Director of SHPDA, the ad hoc committee reviewed both the Albertville and Guntersville applications and determined they were suitable for submission to the full CON Board. (Tr. 504, 505) At the August 13, 1985 CON Board meeting, the applications were then approved.

Adding further confusion to the process, the actual written CONs were not issued to the aforementioned applicants until on or about October 16, 1985. On such date, CON number 731-N was issued to "*Barfield Healthcare, Inc.*" for the "*construction of a new 103-bed replacement facility.*" On the same day, CON 732-N was issued to "*Albertville Nursing Home, Inc.*" for the "*construction of a new 133-bed replacement facility.*" Inexplicably, the certificates did not refer to the emergency procedures, instead appearing on their face to be certificates issued in accordance the normal application process.[12]

The applications were also filed at a time in which the Governor of Alabama had issued an executive moratorium on the acceptance of CON applications for other than the authorization of *"expenditures of an emergency nature"*. *Executive Order 28,*

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12. The April 9, 1991 Order requires the CON Board to deviate from the normal "emergency" procedure under which the applications were filed in order to meet Clark's constitutional right to a full hearing process. The parties have agreed, however, to the procedures involved with the current proceeding.

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August 1,1984 (B/C 194) The moratorium was amended to also provide for the consideration of applications for the *"purchase, lease,· acquisition, use or operation of hospital or medical equipment", Second Amendment to Executive Order 28,* January 28,1985. (B/C 94) The moratorium has since expired.

The applicants allege that *"emergency"* conditions truly existed in 1985. They contend that the conditions at the respective facilities, both structurally and operationally, had deteriorated to a point that an emergency situation existed which resulted in an *"eminent threat to public health"*. Clark contests the allegations concerning the conditions at the respective facilities and, in any event, asserts that responsibility for identifying and, in most cases repairing, any such defects were contractually the responsibility of the applicants as lessees. The CON Board's findings of fact regarding the conditions at each of the facilities are discussed below.

II.

A. Condition At The Albertville Facility

The Albertville facility was originally built in 1961 by Clark, with an addition constructed in 1969. (Tr. 1462) According to Clark, the original building was designed by a *Mr. Kohn*, an architect in Birmingham , who is now deceased. (Tr. 1464) A *"Mr. Charlton"* of Birmingham served as the *"structure engineer"*, according to Clark. (Tr. 1464) At the time of construction of the facility, Mr. Clark testified that he held a general contractors license in the State of Alabama, which allowed him to supervise the construction. (Tr. 1466) Subcontractors included a "Mr. *"Whitacker"*, whose company provided concrete and poured the *footings and the stemwalls.* (Tr. 1466) Clark testified that the

building was constructed with a "*cast-in-place*" concrete roof which was imbedded with 7/8 inch wire cables. (Tr. 1467) According to Clark, the State of Alabama sent an inspection team to Albertville prior to the nursing home being completed. (Tr. 1468) He testified that the facility, including the roof, passed the test performed by the state inspectors for structural integrity. (Tr. 1468) Following the construction of the nursing home, Clark testified that a second inspection was undertaken by the "*licensure people*", which gave the building an A-2 fireproof rating. Additionally, he stated the concrete was tested each day by an independent testing company. (Tr. 1470) Since the 1969 addition, the Albertville Nursing Home has historically had a bed complement of 103 SNF beds. Between 1961 and 1986, Clark operated the nursing home facility himself at times, while at other times leasing it out.

On cross examination, Clark's memory of events and circumstances surrounding the construction and operation of the Albertville, as well as Guntersville, facilities proved to be defective, due undoubtedly to his advanced age. In particular, Clark was unsure as to his role with the Albertville facility shortly before Ms. Cole began operating the facility under a ten year lease in late 1976. He also was unable to remember the name, date, and responsibilities of those who were either leasing the facility from him or were employed by him in an administrative capacity. (Tr. 1614-1619)

Most of the testimony in regard to the Albertville facility centered on conditions at the facility from the mid-seventies until the time the CON was issued by the CON Board on October 16, 1985. As is shown below, the record reflects that there existed extremely poor conditions at what was then apparently known as the "*Marshall County Nursing Home*" in the months leading up to

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Clark's execution of the 1976 lease with the Albertville Nursing Home, Inc., and Ms. Cole, and their subsequent operation of the nursing home.

The applicant presented the testimony of Stella M. Camp, R.N. with the State Bureau of Licensure and Certification of the Alabama Department of Public Health regarding the conditions at the Albertville facility. On February 6,1975, Ms. Camp and Mr. Tom Hewette of the Department of Public Health arrived for an on site visit of the facility. The written findings resulting from this inspection are contained in B/C Exhibit 89. According to nurse Camp, there was virtually "*no care being provided*" at the facility, with several patients obviously suffering from neglect. (Tr. 393) Ms. Camp's testimony reflects that the quality of care at the nursing home was, without question, extremely poor at this point in time. As a result of the inspection, it was recommended that the license for the nursing home be revoked (Tr. 395, 396).

A second inspection occurred on October 28, 1976 by Mr. Lee Robbins with the Bureau of Licensure and Certification. Mr. Robbins' report is contained in B/C Exhibit 92. The inspection had been instigated due to complaints over the layoff of a large number of employees, which allegedly endangered the care of the residents. Mr. Robbins was met at the facility by Mr. Clark and Ms. Judy Jennings, Office Manager. Mr. Hugh Heaton, identified on the nursing home stationary as "*Administrator*", was reported to be in Florida during the inspection. The inspection revealed that sixteen employees had been recently laid off by the nursing home. Mr. Robbins indicated that Mr. Clark appeared knowledgeable about the reasons behind the layoff and the operations of the nursing home, which suggests that he played an active role in the management. Mr. Robbins' report chronicles generally poor operating conditions at the nursing home, with

staffing being "*insufficient to meet the needs of the patients in the facility*". (B/C Exhibit 92) As a result of the unsuitable conditions witnessed by Mr. Robbins, he recommended that license revocation proceedings be instigated if corrective action was not taken in 30 days.

Ms. Dottie Starnes Mosely also testified concerning conditions in the Albertville facility in 1976 and 1977. Ms. Starnes is a licensed dietician and worked at different times with Mr. Clark on a consulting basis. (Tr. 671) Ms. Starnes indicated that on several occasions the dietary needs of the patients at the facility were not met due to lack of suitable food and the use of potentially contaminated canned goods. (Tr. 672) When she discussed these problems with Mr. Clark, he indicated that they would be corrected, however, the problems continued. (Tr. 674, 675) She also indicated the layout design of the nursing home was poor because the kitchen was in the middle of the facility, was constructed totally of cement and was hard to clean and that there were numerous cracks in the "*hilly*" floor which resulted in employees stumbling. (Tr. 676) She also complained about vermin and that the temperature in the kitchen had risen to a level that imposed a health hazard. (Tr. 677). Finally, she also was of the opinion that the configuration of the kitchen resulted in unsafe dishwashing procedures (679).[13]

In late 1976, an apparent response to the negative inspection reports, Clark entered into negotiations with Ms. Cole for her to

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13. Ms. Mosely testified that the conditions in the facility improved somewhat after the Ms. Audrey Cole took over operational control (Tr. 686) As examples, she testified that some of the cracks were filled and a booster for the dishwasher was added. (Tr. 686) The dim lighting was also improved under Ms. Cole (687). However, the floor remained unlevel and, eventually, she recalled a portion of the building being roped off and blocked with a tarpaulin. (686).

take over operation of the nursing home.[14] Ms. Cole, who had previously worked as administrator of the nursing home, informed Mr. Clark that she would not be associated with the nursing home again unless she had total control. (Tr. 1032)[15] She testified Clark agreed with this demand. As evidence of this intent, the applicant submitted a copy of a letter dated November 15, 1976 from "*E. L. Clark, NHA*" to Mr. Clay H. Dean, reflecting that the facility was being leased to Ms. Audrey Clark and confirming the "*releasing of the Certificate of Need contingent upon the lease being approved by the Bureau of Licensure and Certification and your Bureau and Medical Services Administration*", with similar letters being sent to other state officials on December 8, 1976 (B/C Exhibits 93, 97 and 98).[16] The applicant contends these records are indicative of the intention of the parties and bear on whether Mr. Clark was holding himself out to be the holder of the nursing home rights at the facility at such time as such authority was grandfathered in 1979.

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14. Clark stated that the reason he entered into the subsequent lease with Audrey Cole was due to the fact that he made more money under a lease arrangement than "*just keeping her there as an administrator*". (Tr. 1476) The evidence, however, suggests that the parties intended for Mr. Clark to have no operational responsibilities or control with the nursing home.

15. It is unclear as to why Ms. Cole was fired by Mr. Clark in October of 1975, however, testimony revealed that Mr. Clark and Ms. Cole were divorced during approximately this same time period.

16. The testimony in this proceeding reflects that the parties and state officials used the terms "AON" and "CON" interchangeably during the years prior to passage of the 1979 CON statute. There is no question that Mr. Clark was referring to the AON in conversations in 1976 leading up to the lease with Ms. Cole, as there was no such thing as a "*CON*", as we know it today, in 1979.

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Mr. Clark's name was signed to the respective letters by Judy Jennings, his employee. Ms. Cole testified that she overheard Mr. Clark direct Ms. Jennings to sign his name to such letter, in confirmation of a prior telephone conversation with certain state officials to that effect. (Tr. 1034-1035) Mr. Clark denies authorizing such letter. Both Mrs. Jennings and a second employee, Gail Morgan, support Ms. Cole's version of events. (Tr. 643)[17] In addition. Mr. Charles Robbins of the Alabama Department of Public Health testified that, following the Licensure Advisory Board decision in 1976 to degrade the Albertville license to probational status, Mr. Clark stated to the Board that he no longer was going to be in the nursing home business. He requested the Board's "*indulgence*" in regard to its proceedings to revoke his license due to the fact that "*he was in the process of selling or getting out of the nursing home business*". (Tr. 143)

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17. In reaching his conclusion that both Mr. Clark and Ms. Cole had a property interest in the Albertville CON, Judge Thompson refused to give credence to the 1976 letter. Judge Thompson stated that the document is "questionable" because Clark didn't sign it and because the document purports to convey CON rights three years before the CON statute was enacted. Judge Thompson also points out that a person cannot convey his or her CON interest without SHPDA approval. As to the genuineness of the document and Ms. Jennings authority in signing it, however, the CON Board is not aware of whether the federal court had the benefit of the testimony of Ms. Jennings. Ms. Jennings currently resides in Mississippi and has no business relationship with either party to this case. The CON Board finds her testimony credible.

The CON Board agrees with Clark, however that the documents are not dispositive of the relative rights of the parties under the CON statute. Nevertheless, they are one additional, small part of the facts that determine the "*totality*" circumstances surrounding the operation of the nursing home and the status of the parties at the "snapshot" date in 1979, when the grandfathered interest were established.

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On December 8, 1976, Clark entered into a lease with *Albertville Nursing Home, Inc.*, and Audrey B. Cole (then Clark) for the Albertville facility. The lease had a term of ten (10) years, with a five year option to renew. Lease payments were calculated on a "*per bed*" basis based on the expected reimbursement rate of the Medical Services Administration (now the Alabama Medicaid Agency). The lease contained a provision that if the number of the beds in the facility increased, the rent would also increase. (B/C 96)

Clark cites the relationship in the lease between bed capacity and rental payments as evidence that he was offering healthcare services by leasing his nursing home to the applicant, as opposed to leasing a mere facility in which the lessee's were operating a nursing home. Clark also cites provisions in the contract requiring the lessors to comply with all state and federal laws and regulations to provide the owner with a copy of all inspection reports and to use the property only as a nursing home. (B/C 96) The lease contained language by which the lessors acknowledged receipt of the premises in good order and agreed to maintain the premises in the same condition. Under the terms of the lease, the lessees are specifically responsible for maintaining the "*air conditioning, heating, equipment, furniture and fixtures.*" The lease also provided for financial responsibility for minor and major repairs. Specifically, the lease provides that the owner be responsible for all structural repairs in excess of one thousand ($1,000) dollars.

Ms. Cole testified that the situation existing at the nursing home at the time that she took over in 1976 was "*deplorable*" and that she was required to take immediate steps to take care of the needs of the patients for items, such as furniture, painting, new drapes, cubicle curtains, paving of parking lots, installation of

tile and fixing the floor in the activity room. (Tr. 1040) She also employed a licensed electrician to maintain the air conditioners and refrigerators. When the air conditioners were no longer repairable, she bought new ones. (Tr. 1040) She also patched the roof until, in her words, "*we couldn't patch anymore*". (Tr. 1041) She testified that she ultimately got an estimate of fifty thousand dollars ($50,000) to fix the roof and presented it to Mr. Clark, who declined to assume responsibility for payment of any of the amount. (Tr. 1056) She stated that the lack of insulation in the building resulted in severe heat during the summer and cold during the winter. She testified the employees had to work with coats and sweaters and occasionally that they would have to keep the patients in bed because it was too cold to get them up. (Tr. 1041) Additionally, the sewage was "*always backing up*". (Tr. 1043) She testified that they made some attempt to improve the sewage system, however, it couldn't be fixed due to the manner in which it was constructed. (Tr. 1043) The lack of insulation also resulted in high noise level, according to Ms. Cole. (Tr. 1044)

It is apparent from the evidence that Ms. Cole improved the operating conditions at the Albertville facility after she took operational control in late 1976. Problems remained, however, and several witnesses testified that the situation at the Albertville facility deteriorated in the year leading up to the "*emergency*" application.

Dr. Lynn Luther served as medical director at the Albertville Nursing Home from 1981 until its closure. (Tr. 3.24) Dr. Luther testified at length concerning poor conditions at the nursing home in late 1984 and 1985 that "*we just simply were not able to resolve*". (Tr. 356) Dr. Luther observed that rooms in the facility were at times so cold that patients had to be moved to other areas, while in the summer areasin the building were so hot that patients

had to be moved to the shady side of the building for comfort. (Tr. 357) He recalls "*constant*" problems with the sewer system. (Tr. 357) Like others, Dr. Luther saw evidence of roof leakage, having observed that rain would "*drip through into patients beds*". (Tr. 357)

Dr. Luther testified that events seemed to culminate in 1985, when a crack began appearing between the concrete slab in what Dr. Luther presumed to be a supporting wall of the building. Dr. Luther testified that the crack grew considerably over a couple of months and that as a result the nursing home staff moved the patients out of the adjacent room for fear of their safety. (Tr. 359) Dr. Luther testified that the crack in the wall made him feel like the building was no longer safe. (Tr. 359)

Dr. Luther also testified that the acoustics in the building were poor, resulting in a very high noise level, requiring nurses at the main nurses station to "*scream*" at one another to carry on a conversation. Dr. Luther also recalled Ms. Cole's efforts to put in a suspended ceiling and fluorescent lighting, a project which was later halted by Mr. Clark (Tr. 379)[18] Also, the call system from the patients rooms to the nurses stations only worked periodically. In addition, Dr. Luther testified that in his opinion the general layout of the building made it very difficult for the nursing staff to have any sort of visual contact with the patients. Dr. Luther testified that, based on his observations, the conditions at the nursing home presented a danger to the health and safety of the patients in August of 1985.

At cross examination, Dr. Luther conceded that he was

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18. Clark asserts that the project was halted due to the fact that the lease was expiring and Ms. Cole had been told that she woutd have to leave the facility.

unaware of any patients who suffered any kind of injury as a result of the shifting wall, nor did he ever observe any portion of the wall actually falling. (Tr. 365) He also stated that he had not filed any complaint or report to the Division of Licensure and Certification in regard to the conditions that he observed. (Tr. 366) Although Dr. Luther testified that he felt that Ms. Cole had attempted to do everything possible to improve the air conditioning system, he stated that he was not aware of any effort by Ms. Cole to explore putting in a heat pump system. (Tr. 368)

The applicant also presented the testimony of Arthur Joe Grant. Mr. Grant was employed for 21 years as an employee of the State Health Department in an architectural capacity. Mr. Grant graduated from Auburn University with a degree in architecture and served with the United States Corps of Engineers. He had several job titles with the State Health Department, the last being Director of the Division of Plans and Construction. In 1985 he served as Director of the Division of Technical Services of Plans and Construction.

Mr. Grant testified both as to conditions with the Albertville and Guntersville facility. In regard to the Albertville facility, Mr. Grant was questioned concerning a report that was prepared by the Department of Public Health and transmitted by him to SHPDA on August 12, 1985. (B/C 128) The report had been written by Mr. Cecil Barnes of Mr. Grant's staff, as part of the State Health Department's procedure of making available to SHPDA results of their inspection reports. (B/C 128) Mr. Grant informed SHPDA on behalf of the Department of Public Health that there existed "*hazards to patient safety*" in the Albertville facility. The report discusses generally the apparent movement associated with the new wing of the building as well as the fact that the back wall of the "*sun parlor*" "*appeared*" to be leaning

into the building. The report reflects that the roof slab of the building is "*cracked all the way through in two places*" and that there are leaks "*throughout the building*". It also cites the fact that there is not a "*clean utility room*" in the 1968 addition, with no utility rooms found in the original building.

Mr. Grant visited the Albertville facility personally on March 26, 1986, which is reflected in a report he drafted shortly thereafter (B/C 139).[19] The April 16, 1986 report discusses efforts by Ms. Cole to partition off portions of the building (identified as the "*north and south end of the lobby*") to avoid injury in case of further deterioration, fracture or collapse. Mr. Grant testified that at the time of his March, 1986 inspection, he was aware that the patients would soon be transferred to a new facility, however, he was concerned of a "*potential structural failure*" in the interim. Mr. Grant testified, based on personal observations and review of structural reports prepared by others, the recreation space separating the 1963 building was structurally dangerous. (Tr. 196-198) He also expressed concern over the possibility of a collapse of the roof. (Tr. 192) Despite his concerns over "*serious structural failure*", he felt that the fact that the area had been partitioned and roped off with a heavy duty canvas provided adequate protection for the patients in the interim. Other concerns such as sewage, leaking pipes, etc. were, in his opinion, not as serious. (Tr. 192)

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19. Clark and RTC objected to any testimony concerning conditions at the facility which occurred after the date of the 1986 hearing. The testimony was allowed and exhibits admitted on the basis of Mr. Grant's testimony that the inspection report revealed conditions of a "*permanent type*" which would have existed for some length of time, certainly as far back as August of 1985. The hearing officer allowed testimony on behalf of the applicants *and* Clark of conditions that existed at the time that the applications were filed and considered, even if such testimony happened to be based on inspections which were made shortly thereafter. (Tr. 182)

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Mike Mostella[20] also testified and described certain conditions at the Albertville facility, and provided a narrative for a video tape of the premises. (B/C 144)[21] The film as edited, touches on many of the problems with the facility cited by other witnesses. On cross-examination, Mr. Mostella, who was responsible for maintenance at the Albertville facility, testified that he did not take action to correct or mitigate certain non-structural problems that he described, such as the existence of exposed wiring on the ceiling of the building.

Mr. Frank Bolding and Mr. B.H. Nunnelley also testified as to conditions in the Albertville facility. Mr. Bolding worked as a maintenance employee in the Albertville facility from 1980 to 1985. Mr. Bolding's observations support the testimony of the other witnesses concerning the conditions at the Albertville facility. He also testified that the copper tubing used with the plumbing system was incompatible with the concrete construction and was constantly getting "*pin holes*" resulting in constant leaks. (Tr. 48) He also testified that there were cracks in the floor which allowed bugs and, in one instance, snakes, to obtain access to the building. (Tr. 55) On cross-examination, he agreed that Ms. Cole was successful in reducing the bug problem by having the exterminator visit often. (Tr. 71-72)

Ms. Cole provided additional testimony as to the conditions in the Albertville facility in late 1984 and 1985, which she claims

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20. Mr. Mostella is the son of Ms. Cole.

21. The hearing officer ultimately admitted an edited version of the videotape which excluded those portions of the videotape that the witness could not testify, with certainty, reflected conditions that had not materially changed since 1985 (the videotape was taken in 1989). A similar procedure was followed with the videotape introduced into evidence in regard to the Guntersville facility (B/C - 143).

constituted the emergency situation justify the application. She testified that in late 1984, she noticed that the walls were actually shifting and the ceilings were separating and allowing rain to enter. The movement in the walls and the ceiling made her fearful that the walls would fall and that her patients, visitors and employees would be hurt. (Tr. 1042)

In order to attempt to protect the public from what she considered to be structural deficiencies in the building, Ms. Cole put up a tarpaulin to keep everyone out of the lobby area that connected one part of the older building from the new part. (Tr. 1044) She moved some of the patients from this general area and allowed no one to enter the area except her employees. (Tr. 1044)

During this general time period, Ms. Cole indicates that she received a copy of an inspection report by Danny Brisendine, a professional engineer, on the condition of the Albertville nursing home. A copy of this report was sent to Mr. Clark by cover letter. (Tr. 1051; B/C 118)[22] In response to the report, Ms. Cole indicated that Mr. Clark backed a cement truck up to the building and put some cement in areas in which there was "*no foundation*" (Tr. 1054). According to Ms. Cole, he took no other action and refused to respond to other requests for him to pay for structural repairs in excess of one thousand dollars ($1000.00), consistent with the lease. (Tr. 1055) As an example, Ms. Cole indicates that she received an estimate for fixing the roof of fifty thousand dollars ($50,000) and presented the estimate to Mr. Clark. Mr. Clark responded by telling her that she would be required to fix it herself. (Tr. 1057)

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22. Mr. Brisendine was not available for cross-examination by Clark, therefore, his report (B/C-116) was admitted into the record for the limited purpose of showing that Mrs. Cole placed Mr. Clark on notice of her concerns over the structural integrity of the building. The actual conclusions of Dr. Brisendine have not been reviewed or considered by the hearing officer.

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On cross examination, Ms. Cole stated that the emergency that caused her to seek the emergency CON was the wall movement and concern over the status of the foundation. (Tr. 1080) In this regard, she indicated that she looked on the outside of the building near the roped off portion of the lobby and saw what appeared to be a lack of foundation under that particular portion of the building. (Tr. 1083) Despite the adverse reports by Arthur Joe Grant and Mr. Barnes, however, she conceded that she had never been told that she was in danger of being placed on probation by the State Department of Public Health. (Tr. 1081) She also acknowledged that she would have been reimbursed ultimately through Medicaid for costs associated with any repair that she undertook with the Albertville facility. (Tr. 1087)

Ms. Cole also testified as to the other, less immediate, problems with the Albertville facility. In response to questions about the inadequate size of the kitchen, Ms. Cole testified that Mr. Clark had promised to build a new one, yet never carried through with his promise. (Tr. 1095) She also testified that she needed more private rooms for her patients, however, she admitted she could have converted semi-private rooms to private rooms, which would have resulted in a reduction in the bed capacity of the facility. She did not examine the possibilities of adding to the building (Tr. 1101, 1103)

As a result of the conditions in 1985, Ms. Cole indicates that she retained assistance in seeking authority from SHPDA to relocate the beds. She states that she planned to build a facility that had adequate heating, cooling and plumbing. She also planned to build a facility that had a dining room that would allow all the residents to eat at one time, rather than in shifts and would have a large conference room for exit interviews. It was also her intention to build a facility with smooth walls and ceilings and an

adequate laundry room with interior access. She also desired an ambulance entrance that would allow patients to be picked up or dropped off at the facility without being exposed to the elements. (Tr. 1049)

Mr. Tignor Zorn, past director of the Bureau of Licensure and Certification for the Alabama Department of Public Health, testified on behalf of Clark. He stated that in order to receive a license, the original Albertville facility had to have been subject to an on site visit to insure that it was in compliance with the State Board of Health rules and regulations then in existence. (Tr. 1376) He has no independent memory, however, of such an inspection. He also doubts whether the architectural plans were ever reviewed. (Tr. 1375)[23]

Clark also presented the testimony of Beaul Hunkapiller in regard to the condition of the Albertville facility. Mr. Hunkapiller graduated from Auburn University in engineering and has held a variety of jobs in the civil, structural and architectural areas (Tr. 1269). He is currently in private business in Guntersville. Mr. Hunkapiller took issue with the allegations that the Albertville facility was structurally unsound and represented an imminent threat to the residents. Mr. Hunkapiller determined both the Albertville and Guntersville facilities, although he made a more comprehensive inspection of the Guntersville facility. (Tr. 1272, 1295)[24]

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23. Mr. Zorn was evasive concerning the purpose of his testimony and only reluctantly conceded that he had an agreement to be paid by Clark for his expert testimony and services.

24. Mr. Hunkapiller's testimony was limited to those conditions at the Albertville and Guntersville facility that he could testify with a high degree of certainty were existence in 1985.

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In regard to Albertville, Mr. Hunkapiller reported that the type of soil found in Albertville area is a type of sandy soil on top of sandstone rock. (Tr. 1282) According to Mr. Hunkapiller, the footings appeared to have been dug into either the top of the rock or into the "*firm subsoil*". (Tr. 1282) Mr. Hunkapiller only did an in depth examination of those footings which were exposed at the Albertville facility and did not make an examination to determine if there was steel reinforcement in such footings. (Tr. 1283) He found only "*slight settlement*" of the footings at the new addition of the Albertville facility, which he stated was consistent with the conditions shown on the video. (Tr. 1284) He stated that this sort of crack was "*minor*" and common for buildings of such age.

Mr. Hunkapiller confirmed that there have been movements in walls in the "*lobby, . . . the activity room or whatever, the general purpose room*". He could also tell that there had been some patchwork done in the northwest corner. Finally, he found cracks all the way through in the roof of the older portion of the building. (Tr. 1286) Mr. Hunkapiller also testified that he noticed that there was a crack in one of the block walls in a patient's room that went all the way through the wall, exposing daylight. (Tr. 1355) He stated that such crack would typically be repaired by sawing it out and placing a "*mastic*" (a thick tar substance) in the crack. He observed that regular roofing tar had been poured into a crack in a repair attempt. (Tr. 1287)

Mr. Hunkapiller also examined the concrete slab porch floor at the rear of the original north wing of the Albertville facility. (Tr. 1288) This floor had "*collapsed*" in the center. (Tr. 1288) He attributed the collapse to "*poor construction*" and a lack of adequate support underneath. Nevertheless, he testified that the porch was a "*localized typed thing*" that could have been replaced and would not effect the structural integrity of the building.

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Mr. Hunkapiller also commented concerning the "*honeycombing effect*" on the concrete observed in the video. He stated that the honeycombing was caused by air being left in the concrete during construction, which caused portions of the concrete to "*pop off*". He stated that this did not affect the structural integrity of the roof and could be corrected by rubbing a concrete grout mixture over the area and covering it with flashing. (Tr. 1290) He testified that the roof itself was composed of tar paper covered by roofing compound and was without insulation. (Tr. 1291)

Mr. Hunkapiller stated that he had reviewed certain concrete tests performed by the Pittsburgh Testing Laboratory at the time of the original construction of the facility in March of 1961 and during the construction of the addition in 1969. According to the reports, the concrete that was tested exceeded the minimum strength requirements.

On cross-examination, Mr. Hunkapiller conceded that the "*sidewall*" at the Guntersville facility was crooked and separated from the building itself. (Tr. 1324) He also conceded that one of the pictures of the facility showed one block of the "*real*" wall to be loose, although he had not observed any problems with any other blocks. He also stated that all of the footings to the building did not have a twelve inch soil cover, which is desirable. (Tr. 1340)

Mr. Hunkapiller attempted to find plans from the Albertville building, however, none were available. He had no personal knowledge whether the plans were ever drawn. however, Mr. Clark indicated to him that plans were followed in the initial construction. (Tr. 1348)

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In response to questions regarding the construction of the facility, counsel for the intervenor patients presented Mr. George W. Edmonson, who was retained by Mr. Clark in conjunction with the improvements to the Albertville facility and the original Guntersville construction. Mr. Edmonson stated that in his visit to the original Albertville facility, the facility "*stunk*", and had very dim lighting. The kitchen was very hot and building looked very "*rough*". He estimated that the quality of construction in the original building was "*less than average*". (Tr. 1850)

Mr. Edmonson was questioned concerning a note in the files he maintained from a "*W.G.*", who he identified as Wayne Gray, his project manager and draftsman in regard to the Guntersville project. The note reflects a comment made to Mr. Gray by the structural engineer, an employee of "*Southern Pre-Stressed Concrete*", that he had been told that Mr. Clark was using "*mortar*" or "*masonry mix and sand*" inappropriately in the roof system. Mr. Edmonson said he confronted Mr. Clark with this information, who denied it. (B/C - 215; Tr. 1866) If true, Mr. Edmonson indicated the use of mortar could have negatively affected the integrity of the roof. (Tr. 1835)

Based on the totality of testimony and evidence presented in regard to the Albertville facility, the CON Board finds that there existed at the time of the application conditions in such facility which endangered the health and safety of the patients. This finding and conclusion is based not only on the testimony and inspection reports concerning the shifting of certain parts of the building (which suggest the possibility of structural failure), but also on other conditions which, while not as individually significant, nevertheless negatively affected the health and safety of the patients, i.e., the continual leaking of the roof caused, at least in part, by the structure of the building and the inadequate

insulation and sewage system. The CON Board further finds that the aforementioned conditions were not reasonably "*foreseeable*" within the context of the emergency review provisions and constituted an "*emergency*" for purposes of the CON Statute, the 1985 SHPDA *Rules and Regulations* and the Executive Moratorium.

The CON Board also finds that the deficient conditions at the facility related to the structure itself were, under the terms of the lease, primarily the responsibility of Clark, who's record reflects an unwillingness to cooperate with the lessee to conduct such repairs and improvements in a reasonable fashion so as to protect the health and safety of the patients in the facility. Irrespective of the actual financial responsibility for the repairs, however, the CON Board finds based on the testimony and evidence of record that the repair or renovation of the existing Albertville facility is not a viable alternative.

The CON Board also finds that Albertville Nursing Home, Inc. and its President, Ms. Cole, have exhibited sufficient management capability, manpower, long-range planning and expertise to provide the services associated with the proposed facility.

III.

A. Condition at the Guntersville Facility

In the mid 1970's, Clark initiated construction of the Guntersville facility located in the Claysville-Guntersville, Alabama area. (Tr. 1822) The facility was completed in 1978. Mr. Clark testified that Mr. George Edmonson was the architect of the Guntersville Nursing Home, with Clark himself serving as the

general contractor. (Tr. 1479, 1483) He testified that "*Southern Precast Concrete Company*" was responsible for putting the roof of the Guntersville building in place. He stated that the roof at Guntersville is a "*self-supporting system*" and is fireproof (Tr. 1482) A "*Mr. Whitacker*" was responsible for the concrete work on the footings and foundation of the Guntersville facility. He indicated that it was in the plans to put a "*eight inch beam all the way around [the top of the building] with steel in it*", which was done. (Tr. 1483) Mr. Clark testified that a "*Mr. Kennedy*" was the roof contractor, with "*Martin Plumbing and Electrical Company*" doing the wiring and plumbing. "*Dearman Construction*" did the block and brick work. He stated that a consulting engineer, William T. Hill, drew up the schematic plans for the sewage lagoon system. As with the Albertville facility, Mr. Clark testified that the construction of the facility was inspected by the Department of Public Health, "*three or four times*". (Tr. 1485) The concrete was tested by the Pittsburgh Testing Laboratory and ran "*about four thousand pounds per inch*", which, according to Clark, was a thousand pounds more than the required minimum. (Tr. 1485) He testified that the total cost of the Guntersville facility was one million six hundred thousand dollars ($1,600,000), of which one million two hundred thousand dollars ($1,200.000) was borrowed from City Federal Savings & Loan.[25]

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25. The cost of construction and the amount of Mr. Clark's investment in the Guntersille facility was disputed. The applicant produced a document, (B/C 147), in which Mr. E.L. Clark described his nursing home for purposes of attaining a loan. In this document, Clark requested a loan of $700,000 for the finished Guntersville facility. In March of 1979, however, Clark granted City Federal Savings & Loan (now RTC) a mortgage in the amount of $1,200,000.00 on four parcels of property (including the Guntersville facility) to secure a note in the same amount to Clark and Brindlee Mountain Nursing Home, Inc. Additionally, B/C Exhibit 20 prepared in

(Cont'd)

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As with the Albertville facility, on cross-examination Mr. Clark revealed a very poor memory concerning the facts and circumstances surrounding the construction of the Guntersville facility. Although he testified that the facility was built according to plans prepared by Mr. Edmonson, Mr. Edmonson later testified that the floor slab had already been poured before he first inspected the facility. (Tr. 1479, 1824) In addition, although a sprinkler system was included in the plans, there is no evidence one was ever installed.

The record reflects that Clark constructed the Guntersville facility despite a denial of his application for a AON for the expenditure.[26] On April 17, 1975, Mr. Clay H. Dean, Director of

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conjunction with the request for a revision of the state health plan submitted by Mr. Frank Clark, then President of Claysville-Guntersville Nursing Home, Inc., reflects that the facility was constructed with a $1,200,000.00 loan from City Federal and a loan from Mr. E.L. Clark to the "*nursing home*" for $440,000.00. In B/C 147, Mr. Clark also states that the Guntersville building "*can be used as a nursing home, hospital, motel/lounge and restaurant or rehabilitation center*". According to the memorandum prepared by Mr. B.H. Nunnelly, Audit Supervisor for Medicaid, "Mr. Clark's financial records concerning construction of the facility are, at best, vague, sketchy, and almost non-existent." Mr. Nunnelly stated that the information provided by Mr. Clark was incomplete and contradictory. (B/C 31). The hearing officer finds it impossible to ascertain the actual cost of the Guntersville facility and Mr. Clark's actual investment, due to the consolidated mortgage, lack of construction records and Mr. Clark's poor memory.

26. In a report contained as part of Clark Exhibit 140, prepared in anticipation of Clark's first request for an AON, in 1975, states in regard to an analysis of another Clark property:

> "Official records pertaining to the licensing of this facility for the last several years indicate both physical

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Bureau of Health Facilities Construction, advised Clark that his application for AON for a proposed 91 bed Guntersville nursing home facility had been denied. (Tr. 1513; B/C 2) This denial was appealed to a fair hearing officer, where it was upheld. (Tr. 1515)

At approximately the same time as the Guntersville facility was completed, Clark entered into a five year lease with "*Claysville-Guntersville Nursing Home, Inc.*" (B/C 6) On January 15, 1979, Clark entered into a second lease on the same building with the same lessee. (B/C 18) This second lease provides a property description of the premises and states that it covers "*the building with 103 beds, all equipment, fixtures and furniture located therein.*"

Like Albertville, the January 15, 1979 Barfield lease provides that the premises may be used only as a nursing home. It also states that the lessee is also responsible for complying with all state and federal regulations regarding the operation of the nursing home and is obligated to give Clark a copy of all inspection reports. The acquisition of equipment required to comply with such regulations is, according to the lease, the "*sole*

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> plant and operational violations. The operation as pertains to patient care and services has been marginal to substandard with minor exception during 1970 at which time it was issued a regular license. With the foregoing exception, the facility has operated under a Temporary or Probational license for the last ten years. Operational control during this time has been the responsibility of Mr. E.L. Clark as well as two corporate controls. At the present time, the facility is being considered for a suspension or revocation of license and in which a public hearing will be held by the State Committee of Public Health on March 19, 1975 (moved to Albertville discussion)."

and absolute responsibility of the lessee". The lessee is also responsible for maintaining the "*building, premises, air conditioners, heating equipment, furniture and fixtures . . . together with the parking lots, driveways and shrubbery [sic]*". (B/C 18)

The lease also provides that if any structural repairs are required, the "*Lessee shall only pay the first four thousand thereof and lessor shall pay the excess provided he is notified of the necessity of said repairs*". The lease had a term of ten years and was based on a monthly rental amount of ten thousand dollars ($10,000), said amount being "*temporary until such time [as] a fixed cost can be obtained and approved by the Medical Services Administration*". On February 18, 1979, yet a third lease was executed between the parties (B/C 12). This lease is for a term of five years and provides for different lease payments than the January 15, 1979 lease.

On May 29, 1979, Frank Clark, on behalf of Claysville-Guntersville Nursing Home, Inc., and E.L. Clark signed an agreement which purported to resolve certain disputes between the parties concerning the prior lease agreements pertaining to the Guntersville facility. The agreement provides for financial settlement between the lessee and lessor and restates certain interim lease terms, pending the establishment and approval of a lease payment figure by the Medical Services Administration. The lease states that upon approval of the Medical Services Administration approving a rental figure for the nursing home, the January 15, 1979 Barfield lease was to come in to full force and effect.[27] The parties also agreed to undertake certain acts in

27. The subsequent approval by the Alabama Medicaid Agency, successor to the Medical Services Administration, of the lease costs incurred by "Barfield Healthcare, Inc." appears to satisfy this provision, which results in the parties reverting to the January 16, 1991 lease.

regard to securing a *Certificate of Need* for the nursing home:

> *"6. The parties shall cooperate with each other and mutually pool their efforts so as to secure a Certificate of Need for the nursing home. Lessor agrees to pay one-half of the reasonable attorneys' fees for the services of an attorney in assisting the procurement of such certification provided he approves the selection of an attorney."*

In consideration of the mutual promises contained in the agreement, the parties also agreed to settle certain litigation pending in the Circuit Court of Marshall County, Alabama. (Tr. 1524; B/C 17) As a result of this agreement, E.L. Clark submitted a letter to the Bureau of Health Construction of the Alabama Department of Public Health withdrawing his previously filed application for an AON, basing his withdrawal on the fact that Mr. Frank Clark had leased the facility and filed a similar application. (B/C 18)

Sometime after execution of the January 15, 1979 lease with Clark, Claysville-Guntersille Nursing Home, Inc., contracted with Brooks Barfield to do consulting work in pharmacy and to provide medicine to the patients themselves. (Tr. 774) In August of 1979, Mr. Barfield purchased all of the outstanding stock of Claysville-Guntersville Nursing Home, Inc., from Mr. Frank Clark[28] (Tr. 774-775). Following the purchase, the nursing home continued to be run by an administrator. (Tr. 775)[29]

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28. Testimony suggested that Mr. David Ladshaw may have owned an interest in the corporation, in addition to Mr. Clark. (Tr. 774-775).

29. By buying the stock of the company, Barfield inherited the lease that, by

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Shortly after Mr. Barfield obtained control of Claysville-Guntersville Nursing Home, Inc., he was informed by Medicaid that the eight thousand dollars ($8,000) per month paid by Mr. Barfield's corporation to Clark was an unallowable, non-reimbursable expense. (Tr. 778) Mr. Barfield testified that he discovered that the building had been originally constructed by Mr. Clark without prior AON approval, which was the basis for the denial of requests for reimbursement for lease costs associated with the building. (Tr. 779)

In an apparent effort to assist Mr. Barfield's efforts to obtain reimbursement of lease costs, State Senator Hinton Mitchum requested an opinion from Attorney General Charles Graddick as to whether the "*Claysville-Guntersville Nursing Home is entitled to a Certificate of Need*". Senator Mitchum's request stated as fact that the nursing home held an operating license on January 15, 1979 and was given Medicaid approval on or about February 2, 1979, and was thus operating as of July 31, 1979, the effective date of the CON law.

In response to the information provided by Senator Mitchum, the Attorney General issued an opinion stating that the Claysville-Guntersville Nursing Home "*is entitled to receive a Certificate of Need*" due to the fact that it was existing as of the date that the CON law became effective. (Clark Exh. 146).[30] In response to the Attorney General's opinion, a CON was issued by the CON Board to "*Claysville-Guntersville, Inc.*" on August 18,

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its own terms, was effective as of January 15, 1979 and which had a term of ten years. (Tr. 782; B/C 8).

30. Judge Thompson opined that the 1980 CON was "unnecessarily and improperly issued" to Barfield.

1980. Even with the issuance of the CON, however, the United States Department of Health and Human Services denied reimbursement of such lease cost. (B/C 28)

In one last effort to obtain lease cost reimbursement, Mr. Barfield formed a new corporate entity, Barfield Healthcare, Inc. ("Barfield Healthcare"). This facility entered into a "*sublease*" with Claysville-Guntersville Nursing Home, Inc. On July 10, 1981, the lease costs of Barfield Healthcare were approved for reimbursement. (Tr. 807)

After purchase of the stock of Claysville-Guntersville Nursing Home, Inc., Mr. Barfield testified that he immediately encountered a number of problems with the condition of the Guntersville facility. As with the Albertville facility, the existence and severity of such problems, as well as the responsibility therefore, is disputed by Clark. For this reason, the testimony of each of the witnesses who testified regarding the Guntersville facility must be examined carefully.

Mr. Barfield testified as to a wide range of problems, including leaks with the roof; inadequate kitchen equipment; outdated equipment; problems with the sewerage lagoon system; loose tile on the floor; problems with the air conditioning system; insufficient interior lighting, a window installed backwards; crooked walls; poor insulation; wiring which was run, in some instances, on the exterior walls of the nursing home; needed parking lot repairs; doors that were not flush or plumb and, generally, problems associated with the "*poor layout or design of the facility*". (Tr. 771-803). In an attempt to repair the roof, Mr. Barfield testified that he spent "*several thousands of dollars*". Despite his efforts, he testified that he was never able to stop all of the leaks associated with the Guntersville facility. (Tr. 798) He

testified that he requested that Clark assist in fixing the roof by paying all repair costs over four thousand dollars ($4,000), however, Clark refused. (Tr. 819) He further testified that the lagoon system did not pump properly, requiring the replacement of pumps on a periodic basis. (Tr. 789). As a result, raw sewerage often backed up in the facility. (Tr. 789) As with the roof, Mr. Clark refused to discuss paying any portion of the cost of repairing the sewage system (Tr. 819).[31] Like the Albertville facility, Mr. Barfield indicated that the unlevel nature of the floors caused difficulties. In addition, the slope of the ground around the facility caused moisture to come through the walls. (Tr. 789). The complaints concerning insulation of the Guntersville facility were similar to that cited in regard to the Albertville facility. He testified that he had extreme difficulty in cooling the building in the summer and warming it in the winter due to the lack of insulation in the building. (Tr. 803) Mr. Barfield testified that he attempted to improve the insulation and the sound quality by putting in suspended ceilings. (Tr. 813) He stated that his project was halted when Mr. Clark wrote him a letter saying that the installation of the ceilings violated the lease and that he was required to take it down. (Tr. 813) Additionally, some of the air conditioning units had originally been installed upside down and some of the cinderblock construction was "*crumbling*". (Tr. 792) He also testified that there were not true handicapped designed commodes in the building, as required. (Tr. 794) Moreover, the fire plug installed in front of the building had, instead of being installed to a six inch main, was connected to an inch and a quarter line, which was of no use when the

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31. Mr. Clark replied that a consulting engineer, William T. Hill, drew up the schematic plans for the sewerage lagoon system. He stated that problems with the sewerage lagoon system were caused by the fact that certain drainage valves had never been opened at the sewerage lagoon system, which allowed for water to accumulate and overflow, causing sewage to back up. (Tr. 1490).

Guntersville Fire Department attempted to respond to a fire. (Tr. 795)

In addition to his concern over wiring being exposed on the exterior walls, Mr. Barfield testified that the plugs and switches were not mounted flush with the wall and would protrude as much as two inches, which created a hazard to the patients and employees resulting in skin tears. (Tr. 797)

Mr. Barfield indicated that he had attempted to replace the doors, however, it was virtually impossible, in that many of the frames of the doors were not square and, being in concrete, there was no way to square them. (Tr. 801). In regard to the layout of the facility, he said that the nurse's stations were recessed to a point where a nurse could not look up and down the halls without coming from behind the nurse's station. He also testified that the equipment in the kitchen was old and antiquated. (Tr. 803).

Mr. Barfield also testified to eviction proceedings instigated by Mr. Clark in late 1984 and early 1985. On January 1985, Clark served Barfield with a letter demanding that he vacate the premises by February 1,1985. (B/C 57) The dispute was settled by agreement dated November 26, 1985, but was apparently pending when the application was filed. (B/C 72)

Mr. Clark generally denied all of Mr. Barfield's allegations. He stated that Mr. Barfield never gave him written notification of any needed repairs and, as a result, he indicated that he made no repairs at any time to the Guntersville facility. (Tr. 1501) He testified he is unaware of any structural defects at the facility. (Tr. 1502) Nevertheless, he admitted he had a column or steel beam put up "*on my own*" to support the roof sometime after 1985. He claims, however, that the column is located over a footing. (Tr. 1504)

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Mr. Arthur Joe Grant testified regarding a report containing the results of inspections made by his staff in regard to the Guntersville facility. (B/C 66) The report reflects an inspection made by Mr. Cecil L. Barnes of the Plans and Construction Division of the Bureau of Licensure and Certification on August 8, 1985, which was sent to SHPDA in conjunction with the Barfield application. The report reflects serious problems with the Guntersville facility, including numerous leaks where the pre-stressed roof panels "*butt-up*" to one another; inferior lighting, water seepage into the building caused by improper grading, exposed hot water piping, lack of soiled and clean utility rooms; unlevel concrete slab flooring. The report also states that a twenty foot section of the "*exterior wall*" has separated, leaving a two to three inch gap at the top of the wall. (B/C 66)

Mr. Spurgen Parrish, Sr. also testified as to the conditions in the Guntersville facility. Mr. Parrish is currently chaplain at "*Barfield Nursing Home*" and previously was chaplain at the Guntersville facility from 1979 through 1986. (Tr. 86). His duties included performing weddings and funerals, counseling and hospital visits. He was at the facility two to three times a week. (Tr. 87). Mr. Parrish confirmed that the floors were out of level and, at one time, he tripped over a piece of tile that had come up from the floor. (Tr. 89) He also observed that the walls were not straight and the ceiling was "*not adequate*", resulting in continual leaks all over the facility. (Tr. 91, 92) He also testified that the area in the nursing home in which the patients would worship was inadequate, in that it was too small and provided little privacy and were interrupted by traffic going to and from the kitchen. (Tr. 93) Mr. Parrish observed a serious problem with the sewage backing up into the facility. (Tr. 106) He also confirmed the inadequacy of the heating and air conditioning in the building. (Tr. 95) Finally, he indicated the lighting was also inadequate for reading

purposes in the building. (Tr. 96) On cross-examination, Mr. Parrish conceded that he was unaware of which party was responsible for correcting the deficiencies that he observed. (Tr. 104)

Mr. Larry Boggus testified on behalf of the applicant and the intervenor patients. He holds a degree in building construction from Auburn University and works with the firm of Word and Boggus, which is in the building construction business. Mr. Boggus was in the Guntersville facility in 1985 and made a detailed study of the facility on behalf of the applicant in 1989.[32]

In November, 1985, Mr. Boggus toured the Guntersville facility in response to a request by Mr. Barfield to review the facility and determine if it would be a wise decision to build a new facility instead of renovation. (Tr. 68). After a walk through inspection of the building, Mr. Boggus indicated that he advised Mr. Barfield that it would be a "*gross mistake*" to spend any more money in the old facility. (Tr. 268) (B/C 78, as edited)

Mr. Boggus discussed his inspection report of the Guntersville facility in light of his prior visit to the facility and those conditions to which he could testify with a high degree of certainty were in existence in 1985. The report also contains estimates for the repair of the cited deficiencies in the Guntersville facility.

Mr. Boggus cited numerous deficiencies which, in his opinion, were in existence in 1985. For example, the entrance

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32. The hearing officer allowed Mr. Boggus to testify only as to those conditions in the Guntersville facility with which he could testify with a high degree of certainty were in existence in 1985, at the time the application was filed.

drives were in poor shape and would, in his estimation, require a total cost of thirteen thousand five hundred dollars ($13,500) to correct and replace. Concrete parking lots were in similar disrepair and would require total repair expenditure of thirty-three thousand seven hundred and fifty dollars ($33,750). He stated that the concrete ramps to the building were too steep and would need to be replaced at a total cost of thirty thousand four hundred dollars ($30,400). Mr. Boggus testified that his inspection revealed as much as a six inch difference in the elevations of the floor from one end to the next. Depending on how much of the floor was replaced, Mr. Boggus estimated a total repair cost range from thirty-seven thousand one hundred and twenty-five dollars ($37,125) to one hundred forty-eight thousand five hundred dollars ($148,500). He further testified that in 1985 he observed that the floor slab had been poured through the concrete foundation block, which in his opinion indicated that all of the weight from the roof was resting not on the concrete block as needed, but on a four inch unreinforced section of concrete, which he testified indicated a "*possibility of failure*". (Tr. 282)

In regard to the "*exterior wall*" system, portions of the foundation were exposed, which could subject the foundation to freezing and subsequent failure and deterioration. Mr. Boggus described that the exterior brick work was "*atrocious*", constituting the "*worst brickwork, blockwork job I have ever seen*". (Tr. 282) Mr. Boggus recommended the application of an insulated exterior stucco finish which would improve the building cosmetically and would provide needed insulation.

Mr. Boggus testified that subsequent to his 1985 inspection, new steel columns and beams had been added in the wing of the facility housing the dining area and leading up through the

activity area. (Tr. 283) In his opinion, the only structural purpose of such beams would be to "*structurally reinforce the roof deck above*". (Tr. 284). He testified that the supports were defective, however, and that they were located directly on the floor slab and that there was no foundation underneath to support them. (Tr. 285)[33]

Mr. Boggus could not testify that the roof had not deteriorated significantly since 1985 and thus his findings regarding the condition of the roof were not admitted. Other witnesses, however, testified as to the poor condition of the roof in 1985. Mr. Boggus testified that to replace the roof would cost eighty thousand dollars ($80,000). In regard to the doors, frames and hardware of the facility, Mr. Boggus afforded the testimony of other witnesses as to the fact that many doors were not flush and several door frames were out of plumb. (Tr. 286). The total cost of repair was estimated to be at twenty-one thousand two hundred and fifty dollars ($21,250).

He also testified that the original windows in the facility were "*very cheap*", and were single glazed with poor insulating qualities. Additionally, some had been installed "*backwards*". (B/C 78)

Mr. Boggus described the outer walls as "*atrocious*" and the interior walls as "*wavy*". He observed that most openings in the walls were crudely made. He testified that electrical wiring was exposed on the walls, rather than being run inside the block walls as customary. Additionally, some of the electrical outlets were "*hanging out*" of the block wall, presenting a hazard to those

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33. Clark witness Hunkapiller differed with Mr. Boggus on whether there was foundational support for the steel beams.

brushing against it. (Tr. 289) Mr. Boggus could not testify as to any change in the condition of the ceiling from 1985 to 1989. He apparently didn't provide an estimate of installing a drop-in ceiling throughout the entire facility.

Mr. Boggus testified that 1989 was the first time he examined the air conditioning and heating units at the facility. He did, however, observe the plumbing in 1985 and noticed that many of the pipes were exposed. Also, he confirmed that regular commodes had been mounted on a concrete platform to accommodate handicapped patients, instead of installing specific handicapped facilities built for the handicapped. (Tr. 292) Mr. Boggus estimated a repair cost of fifty-four thousand seven hundred forty-three dollars ($54,743) for the plumbing system and seventy-nine thousand one hundred twenty-four dollars ($79,124) for the sprinkler system. He also estimated the cost of installing a fire sprinkler system at fifty-one thousand four hundred four dollars ($51,404). He did not estimate the cost of fixing or replacing the nurses' call system, the fire alarm and security systems, any kitchen equipment or the sewer system.

In summary, Mr. Boggus concluded that the Guntersville facility was the "*worst constructed building that I have seen since graduating from Auburn University*". In 1989 he restated his opinion expressed in 1985 that it would have been a mistake to invest any additional funds in the facility. (B/C 78)

The replacement or renovation costs provided by Mr. Boggus in B/C 78 were in 1989 prices. He estimated that the cost would have been between five to ten percent less in 1985. On cross-examination, Mr. Boggus admitted that his estimate of cost inflation since 1985 was not based on a careful analysis of the consumer price index or any other construction cost index since

1985, but simply on his general knowledge of prices of the period. (Tr. 306). He also stated that he did not use the minimum standards required by the Licensure and Certification Division of the Alabama Department of Public Health for determining what areas needed to be renovated at the Guntersville facility. He did, however, testify on cross-examination that he collaborated with the architect hired by Mr. Barfield in ensuring that the new Barfield facility met such standards. (Tr. 317)[34] He also testified that he did not perform destructive testing techniques on the Guntersville facility and had simply assumed that there was no reinforcing steel in the concrete due to his observations concerning the other building practices employed by Mr. Clark. (Tr. 321-322) He conceded that he did not mean to imply that Mr. Clark did not use concrete wire mesh in preparing his slab. (Tr. 323) He stated that he personally saw only one window that had been installed backwards and did not check to see if this was common in the building. (Tr. 324) He also testified that his estimate as to the replacement costs of the doors was not based on an actual count of the doors at the Guntersville facility, but rather on the number of doors at the new Barfield facility. (Tr. 329) Mr. Boggus also testified that the videotape at the Guntersville facility previously introduced represented a fair portrayal of the conditions in the building as he observed them.

Mr. B.H. Nunnelly also testified on behalf of applicant in regard to the Guntersville facility. Mr. Nunnelly was previously employed as an auditor and audit supervisor for the Alabama

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34. Mr. Boggus was also the general contractor for construction for the new Barfield Nursing Home. While the hearing officer did not allow the applicants to present evidence as to the superior nature of the new Barfield facilities, the existence of such facility is a matter of public record was referred to by both parties and the costs thereof were a part of the comparison that Mr. Boggus was engaged to provide in 1985.

Medicaid Agency. He observed the Claysville-Guntersville building being constructed and described it as a "*very poorly constructed building*". He stated that the walls and floors were built uneven and wavy. (Tr. 109-114) Mr. Clark replied that Mr. Nunnelly "*lied*" in his testimony that he had seen individuals in street clothes working on the building. (Tr. 1511)

Clark witness Hunkapiller also examined the Guntersville facility. He testified that in examining one of the footings he noticed a hairline crack that went through the wall in the area on the south wing in the back side, (southwest corner) which allowed daylight to be seen through the concrete block wall. (Tr. 1297) After examining the entire facility, he indicated that the foundation was in similar condition to that of the Albertville facility, with similar soil underneath. Outside of the hairline crack, he did not notice any serious cracks in the building. (Tr. 1300)

Mr. Hunkapiller used a metal detector in his effort to determine whether there were steel reinforcements or iron rebars reinforcing the foundations. The metal detectors showed that there were ferrous metal on the outside of the foundation. He also reviewed the plans for the Guntersville facility and utilized his metal detector to determine if reinforcement was in the bearing wall and in the foundation as reflected in the plans (Tr. 1309)[35] Based on this technique, he testified that there was iron in the bearing walls and steel in the floor underneath the dining room

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35. Counsel for Albertville and the patients objected to references by Mr. Hunkapiller to the building plans, which had not been made previously available to the applicants, despite their oral request for such documents at the hearing. The record reflects that witness Boggus, who also made an inspection of the building did not have an opportunity to review the plans.

area (Tr. 1310). He testified that in the kitchen area his metal detector indicated that the prestressed roof was held up by 12 inch I-beams supported by tubular steel columns imbedded in the concrete floor. He disputed Mr. Boggus' testimony regarding whether the interior doors were flush and plumb. (Tr. 1312) He also found nothing unusual in the construction of the roof, which he indicated was a typical two or three-ply, built up roof, on top of prestressed concrete.

Mr. Hunkapiller also testified that parts of the concrete floor at Guntersville sit directly on the foundation, in some areas, while in others sits on top of concrete blocks which, in turn, are on top of the foundation. (Tr. 1315) After digging to expose portions of the foundations, he noticed that the foundation was over twelve inches in one place and fifteen inches in another. He testified that there was nothing wrong from an engineering standpoint with the foundation. (Tr. 1316) He stated that the condition of the wall in the back storage room area "*appears*" to be the result of two different buildings which were at slightly different angles. He assumed a facade was built to construct the two buildings and provide continuity to the structure. (Tr. 1318) He testified that if this facade collapsed, it would not effect the structural integrity of the rest of the building. (Tr. 1318)

Mr. Hunkapiller testified that many of the doors of the Guntersville facility had stickers indicating that they had a UL 20-minute rating, although he was not familiar with the doors and did not examine them carefully (Tr. 1319) He also testified that the walls "*looked straight to me*". (Tr. 1320) Mr. Hunkapiller could not tell whether the column that had been installed on the floor in the lobby of the Guntersville facility was on top of a footing, however, he did testify that it appeared to be in line with the "*other line of interior reinforcement in the building*". (Tr. 1322)

Appendix G

On cross-examination, Mr. Hunkapiller did not remember observing many of the conditions at the Guntersville facility contained in the still photos provided as B/C 145. He also did not check the sewage system. (Tr. 1334) He could not confirm the conditions reflected in the photographs showing that outlet boxes were not flush with the wall in the Guntersville facility (Tr. 1337), and conceded that the photographs of an electrical box at the Guntersville facility exhibited an "*undesirable*" situation. (Tr. 1337) He also conceded that some of the footings did not have a twelve inch soil cover to prevent freezing, which would be "*desirable*".

Mr. Hunkapiller was unfamiliar with the steel columns and I-beam in the kitchen and dining room area which were apparently installed after 1985 as a repair measure, however, he agrees with Mr. Boggus that the location of the supports suggests that it was intended to provide additional support for a "*long span across there for the prestressed roof members*". (Tr. 1350) He conceded that the installation of such beams after construction of the building could indicate a "*structural problem*". (Tr. 1351) Nevertheless, based on his examination of the Guntersville facility, he did not develop an opinion that there was a "*structural problem or deficiency*" that caused a threat to the health and safety of the patients. (Tr. 1357)

Mr. Hunkapiller expressed a general opinion that renovation of the Albertville and Guntersville facilities would be cheaper than what his counsel identified was the two million five hundred thousand dollars ($2,500.000) replacement cost for both of the facilities, although he could not testify as to how much cheaper. (Tr. 1361) He did not make any specific evaluation of the economics of repairing the Guntersville facility versus building a replacement. (Tr. 1349)

Appendix G

Based on the totality of testimony and evidence presented in regard to the Guntersville facility, the CON Board finds that there existed at the time of the application conditions in such facility which endangered the health and safety of the patients. This finding and conclusion is based not only on the testimony and inspection reports concerning the shifting and settlement of certain parts of the building (which, like Albertville, suggests the possibility of structural failure) but also on other conditions which, while not as individually significant, nevertheless negatively affected the health and safety of the patients, i.e., the continual leaking of the roof caused, at least in part, by the structure of the building and the inadequate insulation and sewage system. Additionally, Mr. Clark's efforts to evict Barfield constituted an immediate and independent threat to the health and safety of the residents, justifying emergency consideration. The CON Board further finds that they aforementioned conditions were not reasonably "*foreseeable*" within the context of the emergency review provision and constituted and "*emergency*" for purposes of the CON Statute, the 1985 SHPDA *Rules and Regulations* and the executive moratorium.

The CON Board also finds that the deficient conditions at the facility related to the structure itself were, under the terms of the lease, primarily the responsibility of Clark, who's record reflects an unwillingness to cooperate with the lessee to conduct such repairs and improvements in a reasonable fashion so as to protect the health and safety of the patients in the facility. Irrespective of the actual financial responsibility for the repairs, however, the CON Board finds based on the testimony and evidence of record that the repair or renovation of the existing Guntersville facility is not a viable alternative.

The CON Board also finds that Barfield Nursing Home, Inc.

and its President, Mr. Barfield, have exhibited sufficient management capability, manpower long-range planning and expertise to provide the services associated with the proposed facility.

IV.

CONCLUSIONS OF LAW

Based upon a full and fair review of the relevant testimony and evidence of record the official SHPDA files in these matters and the controlling legal principles found in applicable federal and state statutes, the SHPDA Rules and Regulations, and the Orders of the United States District Court in the case of *E.L. Clark. et al. v. Derrill Crowe, et al.*, Civil Action No. 86-T-139-N, the CON Board hereby reaches the following Conclusions of Law:

(1) With respect to Project No. AL-5046-E, the CON Board concludes that Albertville Nursing Home, Inc., as opposed to Clark, is the holder of a "*superior*" "*grandfathered*" CON interest in the 133 SNF nursing home beds and nursing home services located and provided at the physical facility owned by Clark in Albertville, Alabama, immediately before, on and after July 30, 1979. This conclusion is based on an examination of the totality of circumstances involving the relationship of the parties and the operation of the nursing home in light of applicable state law and regulations and the legal principles enumerated in the District Court Orders. It is the conclusion of the CON Board that this result better furthers and serves the public interest of the CON statutes.

(2) With respect to Project No. AL-5046-E, the CON Board

concludes that Albertville Nursing Home, Inc., as the applicant for an "*emergency certificate of need for approval of the relocation or replacement of the subject 133-bed healthcare facility*" has presented sufficient legal evidence demonstrating to the satisfaction of the CON Board that the proposed relocation or replacement of the beds is warranted by "*unforeseen events which endanger the health and safety of the patients*" at such nursing home facility and, as such, meets the criteria for the type of review sought in the original application and falls under an exemption to the executive moratorium in effect at the time the applications were filed.

(3) In regard to Project No. AL-5046-E, the CON Board finds that the proposed facility or services are consistent with the latest approved revision of the appropriate State Health Plan effective at the time that the application was received by the state agency.

(4) Should the CON Board's determination that Albertville Nursing Home, Inc., holds the "*superior*" "*grandfathered*" interest be held to be in error by subsequent administrative or judicial review, it is the further conclusion of the CON Board that the circumstances described by the applicant falls within the "*emergency*" exception described by the Alabama Court of Civil Appeals in the case of *Nursing Home of Dothan, Inc. v. Alabama State Health and Development Agency*, et. al., 542 So. 2d 935, 939 (Ala. 1988) and, therefore, the applications are due to be granted even if it is subsequently held that Clark's interest in the bed authority renders the "*relocation*" of existing beds impossible, thereby resulting in the project being inconsistent with the then effective State Health Plan.

(5) That less costly, more efficient, or more appropriate

alternatives to such inpatient service are not available, and that the development of such alternatives has been studied and found not practicable.

(6) That existing inpatient facilities providing inpatient services similar to those proposed are being used in an appropriate and efficient manner consistent with community demands for services.

(7) That alternatives to the construction of facilities as outlined by the applicant have been considered and have been implemented to the maximum extent practicable.

(8) That patients will experience serious problems in obtaining inpatient care of the type proposed in the absence of the proposed new service.

(9) With respect to Project No. AL-5047-E, the CON Board concludes that Barfield Healthcare, Inc., as successor in interest to, and under common ownership with, Claysville-Guntersville Nursing Home, Inc., is the holder of a "*superior*" interest over that of Clark to the "*grandfathered*" CON interest in the 103 SNF nursing home beds and nursing home services located and provided at the physical facility owned by Clark in Guntersville, Alabama, immediately before, on and after July 30, 1979. This conclusion is based on an examination of the totality of circumstances involving the relationship of the parties and the operation of the nursing home in light of applicable state law and regulations and the legal principles enumerated in the District Court Orders. It is the conclusion of the CON Board that this result better furthers and serves the public interest of the CON statutes. To the extent that approval is required for the transfer, relocation or assignment of CON rights held by Claysville-

Guntersville Nursing Home, Inc. to Barfield Healthcare, Inc. such approval is hereby granted as part of the CON Board's deliberations in this case, for the reasons set out in the Findings of Fact and Conclusions of Law contained herein.

(10) With respect to Project No. AL-5047-E, the CON Board concludes that Barfield Healthcare, Inc., as the applicant for an emergency Certificate of Need for approval of the relocation or replacement of the subject 103-bed health care facility has presented sufficient legal evidence demonstrating to the satisfaction of the CON Board that the proposed relocation or replacement of the beds is warranted by "*unforeseen events which endanger the health and safety of the patients*" at such nursing home facility and, as such, meets the criteria for the type of review sought in the original application and falls under the exemption to the executive moratorium in effect at the time the applications were filed.

(11) In regard to Project No. AL-5047-E, that the proposed facility or service are consistent with the latest approved revision of the appropriate State Health Plan effective at the time that the application was received by the state agency.

(12) Should the CON Board's determination that Barfield Healthcare, Inc., holds the "*superior*" "*grandfathered*" interest be held to be in error by subsequent administrative or judicial review, it is the further conclusion of the CON Board that the circumstances described by the applicant falls within the "*emergency*" exception described by the Alabama Court of Civil Appeals in the case of *Nursing Home of Dothan, Inc. v. Alabama State Health and Development Agency*, et. al. 542 So. 2d 935, 939 (Ala. 1988) and, therefore, the applications are due to be granted even if it is subsequently held that Clark's interest in the bed

authority renders the relocation of the existing beds impossible, thereby resulting in the project being inconsistent with the then effective State Health Plan.

(13) That less costly, more efficient, or more appropriate alternatives to such inpatient service are not available, and that the development of such alternatives has been studied and found not practicable.

(14) That existing inpatient facilities providing inpatient services similar to those proposed are being used in an appropriate and efficient manner consistent with community demands for services.

(15) That alternatives to the construction of facilities as outlined by the applicant have been considered and have been implemented to the maximum extent practicable.

(16) That patients will experience serious problems in obtaining inpatient care of the type proposed in the absence of the proposed new service.

IT IS, THEREFORE, ORDERED by the Certificate of Need Review Board that:

(1) Project No. AL-5046-E, Albertville Nursing Home, Inc., is due to be and the same is hereby granted.

(2) Project No. AL-5047-E, Barfield Healthcare, Inc., is due to be and the same is hereby granted.

(3) That the aforementioned Certificate of Needs shall be valid for a period of ninety (90) days from the date of issuance and

no extensions thereon shall be authorized, consistent Section 410-1-10-.01 of the SHPDA *Rules and Regulations*, 1985.

Done this 26th day of August, 1991.

s/ John Edge
JOHN EDGE, Chairman
Certificate of Need Review Board

APPENDIX H -- CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. *Citizenship Rights Not to Be Abridged by States*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX I — CODE OF ALABAMA

ARTICLE 9.

Control and Regulation of Development of Certain Health Care Facilities.

§ 22-21-260 Definitions.

As used in this article, the following words and terms, and the plurals thereof, shall have the meanings ascribed to them in this section, unless otherwise required by their respective context:

* * *

(5) Health Care Facility. Such term shall include: General and specialized hospitals, including tuberculosis, psychiatric, long-term care and other types of hospitals, and related facilities such as, laboratories, out-patient clinics and central service facilities operated in connection with hospitals; skilled nursing facilities; intermediate care facilities; rehabilitation centers; public health centers; facilities for surgical treatment of patients not requiring hospitalization; kidney disease treatment centers, including free-standing hemodialysis units; community mental health centers and related facilities; alcohol and drug abuse facilities; facilities for the developmentally disabled; home health agencies and health maintenance organizations. The term "health care facility" shall not include the offices of private physicians or dentists, whether for individual or group practices and regardless of ownership, or Christian Science sanatoriums operated or listed and certified by the First Church of Christ, Scientist, Boston, Massachusetts, or veterans nursing home operated by the department of veteran affairs.

* * *

Appendix I

(6) Health Services. Clinically related (i.e., diagnostic, curative or rehabilitative) services, including alcohol, drug abuse and mental health services customarily furnished on either an in-patient or out-patient basis by health care facilities, but not including the lawful practice of any profession or vocation conducted independently of a health care facility and in accordance with applicable licensing laws of this state.

* * *

(10) Acquisition. Such term shall mean and include obtaining the legal equitable title to a freehold or leasehold estate or otherwise obtaining the substantial benefit of such titles or estates, whether by purchase, lease, loan or suffrage, gift, devise, legacy, settlement of a trust or means whatever, and shall include any act of acquisition. The term "acquisition" shall not mean or include any conveyance, or creation of any lien or security interest by mortgage, deed of trust, security agreement or similar financing instrument, nor shall it mean or include any transfer of title or rights as a result of the foreclosure, or conveyance or transfer in lieu of the foreclosure, of any such mortgage, deed of trust, security agreement or similar financing instrument nor shall it mean or include any gift, devise, legacy, settlement of trust, or other transfer of the legal or equitable title of an interest specified herein above by a natural person to any member of such person's immediate family. For the purposes of this section "immediate family" shall mean the spouse of the grantor or transferor and any other person related to the grantor or transferor to the fourth degree of kindred as such degrees are computed according to law.

* * *

Appendix I

(11) Construction. Such term shall mean and include actual commencement, with bona fide intention of completing the same, or completion of the construction, erection, remodeling, relocation, excavation or fabrication of any real property constituting a facility under this article, and the term "construct" shall mean and include any act of construction. "Ground breaking ceremony," "receipt of bids," "receipt of quotation" or similar action that will permit unilateral termination without penalty shall not be considered "construction."

* * *

(13) Institutional Health Services. Health services provided in or through health care facilities or health maintenance organizations, including the entities in or through which such services are provided.

APPENDIX J — CODE OF ALABAMA

ARTICLE 9.

Control and Regulation of Development of Certain Health Care Facilities.

§ 22-21-261 Legislative Findings, purpose of article.

The legislature of the state of Alabama declares that it is the public policy of the state of Alabama that a certificate of need program be administered in the state to assure that only those health care services and facilities found to be in the public interest shall be offered or developed in the state. It is the purpose of the legislature in enacting this article to prevent the construction of unnecessary and inappropriate health care facilities through a system of mandatory reviews of new institutional health services, as the same are defined in this article.

APPENDIX K —CODE OF ALABAMA

ARTICLE 9.

Control and Regulation of Development of Certain Health Care Facilities.

§ 22-21-263. New institutional health services subject to review.

(a) All new institutional health services which are subject to this article and which are proposed to be offered or developed within the state shall be subject to review under this article. For the purposes of this article, "new institutional health services" shall include:

(1) The construction, development, acquisition through lease or purchase or other establishment of a new health care facility or health maintenance organization; or

(2) Any expenditure by or on behalf of a health care facility or health maintenance organization which, under generally accepted accounting principles consistently applied, is a capital expenditure in excess of $500,000.00 for major medical equipment; in excess of $500,000.00 for new annual operating costs; in excess of $1,500,000.00 for any other capital expenditure by or on behalf of a health care facility or a health maintenance organization; or

(3) A change in the existing bed capacity of a health care facility or health maintenance organization through the addition of new beds, the relocation of one or more beds from one physical facility to another, or reallocation among services existing beds through the conversion of one or more beds from one category to another within the

Appendix K

following bed categories: general medical surgical, inpatient psychiatric, inpatient/residential alcohol and drug abuse or inpatient rehabilitation beds, or long-term care beds including skilled nursing care, intermediate care, transitional care, and swing beds; or

(4) Health services proposed to be offered in or through a health care facility or health maintenance organization, and which were not offered on a regular basis in or through such health care facility or health maintenance organization within the 12 month period prior to the time such services would be offered.

(b) The four conditions of "new institutional health services" listed in this section shall be mutually exclusive.

(c) Notwithstanding all other provisions of this article to the contrary, those facilities and distinct units operated by the department of mental health and mental retardation and those facilities and distinct units operating under contract or subcontract with the department of mental health and mental retardation where the contract constitutes the primary source of income to the facility shall not be subject to review under this article.

APPENDIX L — CODE OF ALABAMA

ARTICLE 9.

Control and Regulation of Development of Certain Health Care Facilities.

§ 22-21-265 Certificates of need — Required for new institutional health service.

(a) On or after July 30, 1979, no person to which this article applies shall acquire, construct or operate a new institutional health service, as defined in this article, or furnish or offer, or purport to furnish a new institutional health service, as defined in this article, or make an arrangement or commitment for financing the offering of a new institutional health service, unless such person shall first obtain from the SHPDA a certificate of need therefor; provided, however, all other provisions of this article to the contrary notwithstanding, those facilities and distinct units operated by the department of mental health and mental retardation, and those facilities and distinct units operating under contract or subcontract with the department of mental health and mental retardation where the contract constitutes the primary source of income to the facility, shall not be required to obtain a certificate of need under this article.

APPENDIX M — CODE OF ALABAMA

ARTICLE 9.

Control and Regulation of Development of Certain Health Care Facilities.

§ 22-21-266. Same — Required findings for inpatient facilities.

No certificate of need for new inpatient facilities or services shall be issued unless the SHPDA makes each of the following findings:

(1) That the proposed facility or service is consistent with the latest approved revision of the appropriate state plan effective at the time the application was received by the state agency.

(2) That less costly, more efficient or more appropriate alternatives to such inpatient service are not available, and that the development of such alternatives has been studied and found not practicable;

(3) That existing inpatient facilities providing inpatient services similar to those proposed are being used in an appropriate and efficient manner consistent with community demands for services;

(4) That in the case of new construction, alternatives to new construction (e.g., modernization and sharing arrangement) have been considered and have been implemented to the maximum extent practicable; and

(5) That patients will experience serious problems in obtaining inpatient care of the type proposed in the absence of the proposed new service.

APPENDIX N — CODE OF ALABAMA

ARTICLE 9.

Control and Regulation of Development of Certain Health Care Facilities.

§ 22-21-268 Same — Emergency certificate prior to hearing.

Any person may apply, either independently and without notice under section 22-21-267 or as a part of an application filed under section 22-21-267, for an emergency certificate of need for the authorization of capital expenditures made necessary by unforeseen events which endanger the health and safety of the patients. Emergency capital expenditures include, but are not necessarily limited to, emergency expenditures to maintain quality care, to overcome failure of fixed equipment, including heating and air conditioning equipment, elevators, electrical transformers and switch gear, sterilization equipment, emergency generators, water supply and other utility connections. Applications for emergency certificates of need shall include a description of the work to be done and/or the equipment to be purchased, the cost thereof, justification for considering the capital expenditure as being of an emergency nature and such other information as the SHPDA may require. Emergency certificates of need issued hereunder shall be subject to such special limitations and restrictions as the duration and right of extension or renewal as may be prescribed in the rules and regulations adopted by the SHPDA.

APPENDIX O — CODE OF ALABAMA

ARTICLE 9.

Control and Regulation of Development of Certain Health Care Facilities.

§ 22-21-270 Same — Period for which valid; extension of time; termination; nontransferable.

(e) A certificate shall not be transferable, assignable, or convertible and shall be valid solely to the person and purpose named thereon.

APPENDIX P — CODE OF ALABAMA

Article 9.

Control and Regulation of Development of Certain Health Care Facilities.

§ 22-21-276 Injunctive relief; issuance of license for inpatient beds or facilities in violation of article prohibited; facilities in violation of article not to receive reimbursement for services.

(b) The state board of health shall not issue a license to operate new inpatient beds or any health care facility constructed, or acquired in violation of this article and without a certificate of need issued pursuant to this article.

(c) Any facility or service provided or constructed in violation of this article and without a certificate of need shall not receive reimbursement for services rendered by the health care facility or for the service provided by the facility which is provided in violation of said article without a certificate of need. This provision applies to all reimbursement programs administered by the state of Alabama. Recommendations will be made to other reimbursing agencies that reimbursement be denied.

APPENDIX Q — CODE OF ALABAMA

ADMINISTRATIVE PROCEDURE

§ 41-22-20 Judicial review of preliminary, procedural, etc., actions or rulings and final decisions in contested cases.

(k) Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute. The court may affirm the agency action or remand the case to the agency for taking additional testimony and evidence or for further proceedings. The court may reverse or modify the decision or grant other appropriate relief from the agency action, equitable or legal, including declaratory relief, if the court finds that the agency action is due to be set aside or modified under standards set forth in appeal or review statutes applicable to that agency, or where no such statutory standards for judicial review are applicable to the agency, if substantial rights of the petitioner have been prejudiced because the agency action is:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) In violation of any pertinent agency rule;

(4) Made upon unlawful procedure;

(5) Affected by other error of law;

(6) Clearly erroneous in view of the reliable,

probative, and substantial evidence on the whole record; or

(7) Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

APPENDIX R — STATE HEALTH PLANNING AGENCY PROCEDURES MANUAL (REV. 1979)

410-1-3-.01 The Certificate of Need Program

(6) Notwithstanding any other provisions of the Certificate of Need Program, any persons who meet the provisions of this paragraph shall be entitled to receive a Certificate of Need.

(i) * * *

(ii) Health care facilities and services existing on the date preceding the effective date of Title 22, Chapter 21, Article 9, *Code of Alabama 1975* are not subject to the provision of said Act. The health care facility or service authority may be required to provide proof that the facility or service was in fact in existence prior to the effective date and describe the general scope and limits of the health service provided.

APPENDIX S — STATE HEALTH PLANNING AGENCY PROCEDURES MANUAL (REV. 1979)

410-1-7-.01 (21) Certificate of Need Not Transferable

(i) No Certificate of Need issued under the Certificate of Need Act shall be transferable or assignable and shall be valid solely to the person named thereon. Transfer of the Certificate of Need shall render the Certificate null and void.

APPENDIX T — STATE HEALTH PLANNING AGENCY RULES AND REGULATIONS (REV. 1991)

410-1-8-.22 Substance and Limitation of Fair Hearing

(1) The primary purpose of the fair hearing is to determine whether the application meets the required findings of Section 22-21-266, *Code of Alabama*, 1975, if applicable, and whether it is consistent with the criteria and standards set out in these rules, and whether it is consistent with the appropriate state plan. The fair hearing officer may not consider the correctness, adequacy, or appropriateness of the criteria, standards, and plans against which the application was measured.

(a) The scope of review by the fair hearing officer shall be limited to the following issues:

1. whether the application meets the requirements of Section 22-21-266, *Code of Alabama*, 1975, with respect to inpatient facilities or services, if applicable, as well as whether the application is consistent with each of the applicable criteria and standards set forth in Chapter 6 of these rules, and whether the application is consistent with the appropriate state plan;

2. whether the state agency acted in an arbitrary or capricious manner without a reasonable justification for the decision or absent fixed standards against which the application was measured, or whether the state agency otherwise abused its discretion in deciding among competing applications;

3. whether the state agency materially failed to follow review procedures as set out in these rules and whether the error was substantial in its effect.

Appendix T

(b) The following shall not be considered by the fair hearing officer and shall be deemed immaterial to the fair hearing:

1. the correctness, adequacy, or appropriateness of the criteria, standards or plans by which the application was measured; or

2. new evidence or argument, whether written or oral, which has not been considered by the Certificate of Need Review Board or Administrative Law Judge at any previous hearing; or

3. the determination of whether the proposal is a new institutional health service subject to review as defined by these rules.

APPENDIX U — STATE HEALTH PLANNING AGENCY RULES AND REGULATIONS (REV. 1991)

410-1-8-.26 Further Action by State Agency

The decision of the fair hearing officer shall be considered the final decision of the state agency; provided, however, that the fair hearing officer may remand the application to the state agency for further proceedings consistent with the final order when such remand is required by Section 410-1-8-.25 above.

Supreme Court, U.S.
FILED
NOV 1 1995
CLERK

No. 95-543

(2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

E.L. CLARK,
Petitioner,
v.
DERRELL O. FANCHER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF RESPONDENTS IN OPPOSITION

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NOVEMBER 1995

QUESTIONS PRESENTED

In addition to Question I tendered by Petitioner, the following questions are presented:

1. Was the finding of the Review Board in this case to the effect that the Alabama State Health Planning and Development Agency did not have an established *per se* rule treating the landlord, rather than the lessee-operator, of a nursing home in operation on the day prior to the effective date of the Alabama Certificate of Need Law, Ala. Code § 22-21-260 to -278, as entitled to "grandfather" status, so devoid of support in the record that it must be, as a matter of federal constitutional law, set aside, so that the question of "treating like cases unlike" tendered by the Petition may be reached?

2. Was it a "taking" of the property of the Petitioner without due process of law for the Agency to conclude that the lessee-operators of the nursing homes located in Petitioner's buildings, rather than Petitioner as landlord, had a superior grandfathered right to operate nursing homes, in the light of the findings of the Agency that the Petitioner was responsible for the deterioration of nursing homes that he operated and buildings that he leased to nursing home operators into a condition where they were grossly unsafe and unsanitary so as to endanger the health and safety of the patients, and where all other lawful uses of the Petitioner's land and buildings, apart from their use as health care facilities, remain open to him?

PARTIES AND CORPORATE AFFILIATES

Rule 14.1(b)

The Petitioner has failed to present a list of all parties who are Respondents in this case (Appellees in the Alabama Court of Civil Appeals) as required by Rule 14.1 (b). A full list is as follows: Derrell O. Fancher; State Health Planning Agency (formerly named State Health Planning and Development Agency), an agency of the State of Alabama; Albertville Nursing Home, Inc.; Barfield Health Care, Inc.; Ozettia Gilliland; Ruby Kimberly; Jessie Sims; Dora Stephens; James Thompson; Alma Walls; Nell Broach; Opal Dobbins; Allie Garrett; Anna Hunt; Margaret Johnston; Winifred McVeigh; Sara Smith; and Alta Mae Williams. (Ms. Gilliland, *et al.*, are residents of the nursing homes operated by the corporate Respondents.)

Rule 29.6 Statement

This brief is filed on behalf of all the above-named Respondents. The only Respondents on whose behalf this brief is filed which are corporations are Albertville Nursing Home, Inc., and Barfield Health Care, Inc. Neither of these two corporations has any parent corporation and neither of them has any subsidiary corporation which has stock in the hands of the public.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-543

E.L. CLARK,

Petitioner,

v.

DERRELL O. FANCHER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents oppose the grant of certiorari in this case and request that the Petition of E.L. Clark ("Clark") be denied.[1]

STATEMENT

The Alabama Statutory Scheme.—Prior to July 30, 1979, anyone could "acquire, construct or operate" an "institutional health service," such as a nursing home, in the State of Alabama. Thus, at that time, subject only to licensing, based on a health, safety and sanitation inspec-

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[1] Since there was no judgment of the Alabama Supreme Court other than simply a quashing of the writ of certiorari it had previously granted (Pet. App. 1a), it appears that certiorari should have been sought to the Alabama Court of Civil Appeals, rather than to the Alabama Supreme Court. *See* Robert L. Stern, *et al.*, *Supreme Court Practice* § 6.21 at 326 (7th ed. 1993).

tion by the Alabama Department of Public Health, anyone could construct, acquire or operate a nursing home. On that date, however, the Alabama Certificate of Need Law, Ala. Code § 22-21-260 to -278 (1975 & Supp. 1994), became effective. Thereafter no one could "acquire, construct or operate" a new "institutional health service," including a nursing home or other specified health care service, change the location of an existing one, or increase the bed capacity of an existing facility, without a Certificate of Need ("CON") issued by the State Health Planning and Development Agency ("SHPDA"). In that enactment, the Legislature declared "that it is the public policy of the state of Alabama that a certificate of need program be administered in the state to assure that only those health care services and facilities found to be in the public interest shall be offered or developed in the state." (Ala. Code § 22-21-261; *see also* §§ 22-21-263 and -265) Existing nursing home services were implicitly "grandfathered" and could continue to operate without going through the procedures for demonstrating need imposed by the new legislation. But among other things those services could not, without a CON, move their operations to another facility or add additional bed capacity. The statutory "grandfathering" was not express; it was implicit because of the limitation of the prohibitory provisions of the law to the acquisition, construction or operation of a *new* institutional health service and because of the lack of any provision requiring existing services to justify their continuation by demonstrating need.[2]

Clark as Landlord.—At the time the legislation became effective, Clark was the owner and landlord of two build-

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[2] See, however, pp. 10-11, n.11 below. The operative language in Section 22-21-265(a) was and is: On or after July 30, 1979, no person to which this article applies shall acquire, construct or operate a new institutional health service, as defined in this article, or furnish or purport to furnish a new institutional health service, . . . unless such person shall first obtain from the SHPDA a certificate of need therefor . . . ."

ings leased to others who operated nursing homes in Marshall County, Alabama, one located at Albertville and the other in or near Guntersville. Thus, at the time that the legislation became effective, Clark was not operating a nursing home or other institutional health service; only the lessee-operators were so engaged. Clark then had no license to operate a nursing home.

The building at Albertville had been constructed and expanded in the 1960s and Clark himself had operated a nursing home in it at various times through December 1976. By February 1975, under Clark's operation, conditions at the Albertville building had become so unsanitary and unsafe and the quality of care given there had became so poor that the Department of Public Health revoked Clark's license. (B/C Ex. 89, 141)[3] The license was later reinstated and Clark again for a time operated a nursing home in the Albertville building. But further inspections were made in the Fall of 1976 by the Health Department, which found infestation by vermin, other health hazards and inadequate patient care, and the Department was then again on the verge of revoking Clark's license. (Tr. 141-43; B/C Ex. 92; Pet. App. 42a-43a) In an effort to keep the facility open and avoid requiring the patients to find new care facilities, the public health authorities and Clark agreed that if Clark withdrew from the nursing home business and leased the building to Ms. Audrey Cole ("Cole"), presently the owner of Respondent Albertville Nursing Home, Inc.

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[3] Record references are as follows: "Tr." refers to the Transcript of the evidentiary hearing before the Administrative Law Judge. "B/C Ex." refers to the exhibits submitted by Barfield Health and Cole (the principal of Respondent Albertville Nursing) at that hearing and "Clark Ex." to Clark's exhibits. References to the decisions of the Alabama courts and agency officers appended to the Petition for Certiorari are to "Pet. App." and references to the body of that Petition are to "Pet." The appendices to this brief are referred to as "App."

("Albertville Nursing"), the license would not be revoked and Cole would be given a chance to operate the nursing home as lessee and bring it up to standards. Clark granted Cole a written release of any rights which he had or might have to operate a nursing home in the building at Albertville. (Tr. 1033-36; Tr. 143; B/C Ex. 93, 97, 98; Pet. App. 37a) A ten-year lease of the building was entered into in December 1976 from Clark to Albertville Nursing, a corporation organized by Cole. Albertville Nursing commenced nursing home operations in the building on January 1, 1977.

The Guntersville building was constructed by Clark toward the end of the 1970s. Clark at first proposed to operate a nursing home in the building himself, and made application under a procedure then in effect which required the issuance of an "Assurance of Need" ("AON") certificate by the Alabama public health authorities as a condition upon obtaining Medicare and Medicaid reimbursement for construction costs. On April 17, 1975, Clark's application for the AON was denied by the Alabama Committee of Public Health; the denial was appealed to a Fair Hearing Officer who upheld it. (Tr. 1513-15; Pet. App. 11a-12a, 60a-61a).[4] After this, Clark did not seek a license from the Department of Public Health to operate a nursing home in the Guntersville building, but leased the building to a predecessor in interest to Respondent Barfield Health Care, Inc. ("Barfield Health"), from the start, under a five-year lease initially dated July 12, 1978, before construction was complete.[5] Thus both nursing homes were operated by lessees under long-term leases when the CON legislation

[4] Denial of an AON did not prevent, at the time in question, the construction of the building; it simply affected the reimbursability of the construction costs under the public programs.

[5] The July 1978 lease was replaced by a substitute lease dated January 15, 1979, which was later the subject of a sublease or assignment to Barfield Health.

came into effect and Clark was at that time out of the nursing home business in Marshall County.

The leases on the two buildings required the lessees to perform ordinary maintenance and to effect minor repairs (up to $1,000 in the case of Albertville and up to $4,000 in the case of Guntersville) out of their own pockets but required the landlord to be responsible for structural repairs and reconstructions over those amounts. In the early 1980s, existing structural deficiencies were becoming apparent and various severe problems were developing in the two buildings. In Albertville, these included walls moving, cracks in walls developing to the extent that sections of the building had to be closed off, leaky roofs, defective plumbing, inadequacy of the power system, inadequacy of the lighting, problems with vermin and snakes because of the cracks, absence of insulation, inadequate heating and air conditioning, and sewage backups. (Tr. 60-62; 47-50; 53-58; 357; 1043) Clark steadfastly refused to pay for any repairs in excess of $1,000, which was the limit of the lessee's responsibility. (Tr. 1054-57; B/C Ex. 112; Pet. App. 46a-58a)

While the Guntersville building was quite new in the early 1980s, its construction was highly defective and the physical condition of the building quickly caused unsanitary and unsafe conditions for the patients. The conditions included sidewalks sloping toward the building causing water to flow into it; inadequate utility rooms; nonlevel floors and walls that were not straight; inadequate electrical systems and inadequate plumbing; a roof constantly leaking with vegetation growing on it; a defective sewage system causing a backup of sewage into the building, including the kitchen; a vintage 1942 World War II surplus electric generator; no wall or ceiling insulation; exposed piping; and nonfitting doors. (Tr. 795-99; 819; 1805; Pet. App. 58a-78a) One expert witness, who held a university degree in building construction, said that the Guntersville building was "the worst

constructed building that I have seen since graduating." (Pet. App. 72a)

The CON Applications.—In July 1985, Albertville Nursing and Barfield Health separately made emergency applications for CONs to construct and operate replacement nursing home facilities, having the same respective number of beds, elsewhere in Marshall County. The applications cited the deteriorated and dangerous physical conditions in the two Clark buildings. The applications were premised on the basis that there was a need for the new facilities, not in addition to the buildings owned by Clark, but because Clark's buildings were grossly inadequate in terms of the necessities for the safe and sanitary operation of a nursing home.[6] Under the CON legislation, while Albertville Nursing and Barfield Health could continue their operations where they were conducted on July 30, 1979, without CONs, CONs would be required if they relocated. The SHPDA granted the two CONs to Albertville Nursing and to Barfield Health on October 16, 1985. The SHPDA did not give Clark notice of, or an opportunity for hearing before, the issuance of the CONs to Albertville Nursing and to Barfield Health. In 1986, Albertville Nursing and Barfield Health constructed and moved into the new facilities. Clark applied for nursing home licenses for his two buildings, then vacant, but the licenses were denied on the grounds that he did not have CONs for the operation of nursing homes. (Pet. App. 5a-6a)[7]

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[6] At that time, there was in effect a moratorium, imposed by Executive Order of the Governor, restricting the filing and processing of and action on CONs. Exec. Order No. 28, Aug. 1, 1984; *see* Amendments thereto dated Jan. 28, 1985, and April 30, 1985, extending the same. The moratorium permitted the filing of emergency applications and "replacement" applications. Exec. Order No. 28, Aug. 1, 1984, at 2.

[7] There then followed an episode in which Clark commenced operating a nursing home in his Albertville building without a CON or a nursing home license; health department inspectors at-

The District Court Action.—Clark then commenced an action in the United States District Court for the Middle District of Alabama against members of the SHPDA, various other state officials, and Albertville Nursing and Barfield Health and their principals, on the basis of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. *Clark* v. *Crowe,* M.D. Ala., C.A. 86-T-139-N. He claimed that the issuance of the CONs to Albertville Nursing and Barfield Health violated procedural Due Process Clause guarantees because he was not given notice and an opportunity for hearing prior to the issuance of the CONs. He also claimed that the issuance of the CONs violated substantive Due Process Clause guarantees. In effect, Clark argued that if the lessee-operators moved out of his buildings, the SHPDA was obligated under his grandfathered rights and as required by the Due Process Clause of the Fourteenth Amendment to permit him to start nursing home operations in those buildings himself or to lease the buildings to a new operator for that purpose. He argued that since it was common ground that the number of beds provided at the two existing buildings could not be doubled consistent with the "needs" standard of the statute, therefore CONs could not be issued to Albertville Nursing or to Barfield Health. Clark argued that the District Court should so rule itself and that the SHPDA had no power to rule otherwise. (App. 7a-8a, 13a)

The District Court, in an Opinion (with accompanying Order) entered April 9, 1991,[8] held that the failure to

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tempted to enter the building but were refused access by Clark; the inspectors were forced to obtain a warrant for Clark's arrest and required the assistance of the County Sheriff to enter the building; a criminal prosecution of Clark ensued, in which he pleaded guilty, and a civil injunction action in which Clark consented to an order removing the patients from his building. (B/C Exs. 204, 205, 206; Tr. 411-22)

[8] We attach the Opinion as Appendix A hereto. Certain additional orders of, and proceedings in, the District Court are also presented as Appendices.

give Clark notice and an opportunity to be heard before the issuance of the CONs was in violation of Clark's procedural due process rights. However, the Court rejected Clark's contention that the decision was substantially arbitrary and capricious to the extent that "SHPDA could find in his favor only" in order for its actions to be consistent with the Due Process Clause. (App. 13a) The Court held that "Clark and his lessees have a shared interest in the grandfather status of the Albertville and Guntersville facilities" (*id.*) and ruled as follows:

> The court . . . finds from the evidence that Clark had a sufficient interest in the operation of the two facilities to enjoy a "grandfather status" when the CON statute went into effect in 1979. *The court cannot say that his status was exclusive, however.* Cole and Barfield, as operators of the two nursing homes, also had an expectation in the continued operation of the two facilities when the CON law went into effect.
>
> Clark asks that the court determine who holds the superior interest. The court declines the invitation. The determination turns on more than just legal principles. Whether a lessor or a lessee of a nursing home operation should be considered as the superior holder of a grandfathered operation is more than likely also a matter of policy. Indeed, there was conflicting testimony before the court as to which result, in general and in this case specifically, would better further the public interests of the CON statute. SHPDA should resolve this issue, not the court. (App. 12a-13a; footnotes omitted; emphasis supplied)

The Court's injunctive order required that the SHPDA grant Clark a hearing "with regard to the transfer of the beds and services in his two nursing homes" and to "reconsider *de novo* the transfer of the beds and services in light of any appropriate comments and evidence" Clark might present. (Order of the District Court, Apr. 9,

1991) In response to a motion by Clark for an order establishing that only he could submit evidence at the hearing, the District Court, denied the motion and held that the evidence could come from any source, including Cole and Barfield Health. (App. 15a) Another order entered a few days later made it plain that Clark's case should be heard before the SHPDA's Review Board unless he requested a "contested case" under Alabama procedure, in which case it should be heard by an Administrative Law Judge. (Order of District Court, May 7, 1991)[9]

The SHPDA did not appeal the District Court's decision holding that Clark's procedural rights had been violated. Clark did not appeal the District Court's decision refusing to hold the orders issuing the CONs to be arbitrary and capricious and refusing to grant Clark declaratory relief that he exclusively held "grandfathered" rights to operate nursing homes.

The Agency Hearing.—Proceeding to the agency, Clark requested "contested case" treatment and an Administrative Law Judge ("ALJ") was appointed. Evidentiary hearings took place before the ALJ on seven days in June 1991; over 1900 pages of testimony were transcribed; and over 500 exhibits were tendered by the parties. Clark participated fully with counsel. Under a stipulation as to procedure agreed to by all parties, briefs in the form of proposed orders were to be submitted to the Board contemporaneously with the submission of the ALJ's recommended order. (Pet. App. 22a-23a) The ALJ issued a recommended order to the Review Board of the SHPDA. While the filing of exceptions to the ALJ's recommended decision was not among the agreed procedures, Clark was permitted to file such exceptions (*id.*); a hearing for the presentation of arguments was held

[9] Alabama Code §§ 41-22-12 to 41-22-18 provide detailed procedures for the conduct of contested hearings, the rules of evidence therein, the procedure where the Agency itself has not presided at the hearing, and other matters.

before the Board in August 1991; and a lengthy final order was issued by the Board granting the CON applications of Albertville Nursing and Barfield Health. (Pet. App. 19a-83a)

The Order contained a lengthy analysis of the testimony which had been submitted as to the history of the policies and practices of the SHPDA in construing the concept of "grandfathering" as among multiple holders of interest in a facility, and particularly as between "owners" and "lessee operators." (Pet. App. 30a-36a) The Order's analysis was based on a review of "the records of prior agency actions" and "on the testimony of past and present SHPDA officers." (*Id.* at 36a) The Order noted some contradictions in the testimony of prior and present officials of the SHPDA on the mater. (Pet. App. 30a) The Order's analysis reviewed the testimony of the witnesses Alan Koch, a former executive director of SHPDA; Peggy Schmitz, counsel to the SHPDA, both to the effect that the administrative practice was that the lessee-operator had the superior grandfathered interest; Eugene Watson, who had also served as counsel to the SHPDA, to the same effect; and that of Clay H. Dean, who had been a director of the SHPDA prior to Mr. Koch, at a time when it was part of the State Health Department prior to the enactment of the CON legislation. Dean had never administered the CON law, and his views were different from those of the other witnesses.[10]

Dean's testimony initially was that Clark was "grandfathered" under a provision then found in the Alabama Code as § 22-21-265(b), set forth in the margin.[11] The

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[10] Ignoring the Board's analysis, the Petition provides its own alternative analysis of the testimony of these witnesses at the hearing, drawing, and inviting this Court to draw, different inferences and conclusions from the testimony than did the Review Board. (Pet. 8-15)

[11] The section, which does not appear to be a grandfathering provision in the usual sense, reads as follows in pertinent part:

difficulty with this was that the statutory provision was based on possession of a valid AON, and Clark never had an AON for either of his two buildings. Dean then admitted that the section in question did not apply to Clark but claimed that Clark was grandfathered because, in Dean's understanding, Albertville Nursing and Barfield Health were his "agents." Dean did not recognize any difference between an "agent" and a "lessee." See Clark Ex. 282, Dean Deposition, at 27, 139-44.

In the light of its analysis, and resolving the factual disputes in the testimony, the Order held that the determination of which party held the "superior" "grandfathered" interests as between landlord and lessee-operator had not been the subject of a consistent, historic practice one way or the other, and that accordingly the determination contemplated by the District Court's order "must be made on a case-by-case basis, considering the '*totality*' of circumstances." (Pet. App. 36a; emphasis in original)

Reviewing the evidence at length (*id.*, 40a-47a), the Order found that it was the intention of Clark at the pertinent time to discontinue holding himself out as being in the nursing home business, and it was his intention that the lessee assume the responsibility for providing nursing home services. On this basis the Order held that Albertville Nursing had the superior grandfathered interest which gave it the right to seek a CON authorizing the relocation of the beds in question. (*Id.*, at 37a, 78a) Reviewing the history of the Guntersville operation, largely as set forth above (pp. 4-6), and making findings as to it (Pet. App. 58a-77a), the Order found that Barfield Health, as corporate successor to Clark's original

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(b) Notwithstanding the provisions of subsection (a) of this section, any person who, on July 30, 1979, holds a valid assurance of need issued pursuant to Section 1122 of the Social Security Act, shall be entitled to be issued a certificate of need for the facility or service described on the application for the assurance of need. . . .

lessee, had the "superior" "grandfathered" interest in the beds located there. (*Id.*, at 80a-81a)

In reaching these findings, the Board's Order extensively reviewed the testimony and made findings as to the unsafe and unsanitary physical condition of the buildings owned by Clark in 1985. Based on the testimony, the Board found that the two Clark buildings, at the time of the 1985 applications by Albertville Nursing and Barfield Health, were each in a condition which endangered the health and safety of the patients. (*Id.*, at 77a-78a) The Board also found that the conditions were primarily Clark's responsibility and that the record reflected Clark's unwillingness to cooperate with the lessees to conduct necessary repairs and improvements in a reasonable fashion. (*Id.*, at 77a) The Board also found that given the extent of the conditions and without regard to the responsibility for the repairs, the repair or renovation of the two buildings was not a viable alternative. (*Id.*, at 58a, 77a) The Board also made the necessary statutory findings as to the qualifications of the applicants and the satisfaction of the "need" test under the statute and the satisfaction of the exceptions to the Governor's moratorium on CONs (p. 6, n.6, above) which was in effect at the time the July 1985 applications were filed. (Pet. App. 78a-83a)

Back to the District Court.—Clark filed a request for a "Fair Hearing Review," a procedure involving a further administrative review of agency action by a "Fair Hearing Officer." [12] But without awaiting the Fair Hearing Officer's hearing which he had requested, Clark filed a

[12] This additional procedural protection is provided in the Act dealing with the requirement of CONs, Ala. Code § 22-21-275(14). The implementing regulations provide for appeal from agency decisions denying CONs to a "fair hearing" officer appointed by the Governor, and prescribe the procedure for hearings on such appeals and the standard of review. SHPDA Regs. §§ 410-1-8-.14 to 410-1-8-.26.

petition for judicial review of the Order in the Alabama Circuit Court for Montgomery County on October 26, 1991; and on November 12, 1991, Clark filed a motion in the Federal District Court case,[13] claiming that the administrative action taken by the SHPDA, through the Review Board, was contrary to the terms of that court's injunction issued on April 9, 1991. The motion requested an injunction against further administrative proceedings (including the requested hearing before the Fair Hearing Officer) and against the implementation of the Board's August 26, 1991, order. (Emergency Motion at 22) The Federal District Court denied the motion, finding that "SHPDA has fully and carefully complied with the remedial orders of the court." (App. 16a) In expressing the court's views at the end of the oral hearing on Clark's Emergency Motion, the court said that Clark "got a reasonable decision" and that "I find no failure to comply with the Court's immediate order." (App. 18a)

Administrative and Judicial Review.—On November 15, 1991, a hearing was held before the Fair Hearing Officer, who issued a decision on November 27, 1991, finding that SHPDA did not act in an arbitrary or capricious manner or without reasonable jurisdiction for its decision. (Pet. App. 16a-18a)

After some procedural twists and turns including Clark's filing of two additional actions for judicial review in two different Alabama Circuit Courts, the actions for judicial review were eventually consolidated in Montgomery County Circuit Court. The defendants were Albertville Nursing, Barfield Health, the SHPDA, and Derrell O. Fancher, its Executive Director. A number of the nursing home patients had intervened and participated in the proceedings before the SHPDA, and they also intervened in support of the defendants in the Circuit Court.

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[13] Styled in pertinent part "Emergency Motion for Temporary and Permanent Injunctive Relief To Enforce Prior Orders of this District Court." (Hereafter, "Emergency Motion.")

On June 18, 1993, the Montgomery County Circuit Court entered a judgment affirming the decision of the SHPDA. (Pet. App. 14a-15a) Clark's motion to alter, amend or vacate that judgment was denied on September 1, 1993.

On appeal, the Alabama Court of Civil Appeals unanimously affirmed the Circuit Court's decision and upheld the action of the SHPDA. The court noted that its review of the judgment of the Circuit Court was without any presumption of correctness of the Circuit Court, since the lower court was in no better position to review the Board's order than the appellate court. (Pet. App. 10a) However, the court reiterated the normal standard of judicial review of agency decisions to the effect that the reviewing court may not substitute its judgment as to the weight of the evidence on questions of fact and that the agency's decision is to be upheld unless unreasonable, arbitrary or capricious. (*Id.*) After reviewing the evidence, the court cited with approval the findings of the Board that the correction of the deficient conditions at the two buildings was primarily Clark's responsibility, who was unwilling to make the repairs and improvements necessary to protect the health and safety of the patients. The Board's finding that the grant of the CONs as replacement for the bed capacity in the two Clark-owned buildings was consistent with the legislation, the SHPDA's Rules and Regulations and the Governor's moratorium, and its conclusion that Albertville Nursing and Barfield Health had "grandfathered" interests in the operation of the nursing home beds and services in question before and after July 30, 1979, were also upheld by the court. Thus finding that the Board acted within its authority and that its decision and that of the Fair Hearing Officer were supported by substantial evidence, the Court of Civil Appeals unanimously affirmed the judgment of the Circuit Court. (*Id.*, at 12a-13a)

The Alabama Supreme Court granted Clark's petition for certiorari on November 30, 1994. (Pet. App. 3a)

After briefs on the merits were received, however, that court on May 19, 1995, entered an order quashing the writ of certiorari and denying the petition for certiorari. (Pet. App. 1a)

REASONS FOR DENYING THE WRIT

Clark asks this Court to reassess the evidence which led the ALJ and the Review Board of the SHPDA to conclude that the SHPDA had established no *per se* policy as to when the lessee-operator of a nursing home in Alabama operating on July 30, 1979, and when the landlord of the building in which such a home was situated, had the superior grandfathered right to continue operations, but that the "totality of the circumstances" was to be looked at in each case. Petitioner urges that this Court re-sift the disputed evidence and come to a contrary finding that the landlord *per se* exclusively and always held that status, notwithstanding the concurrent rulings of two courts below that the findings of the SHPDA were supported by substantial evidence. (Pet. 8-15)

In this regard, Clark also asserts that the SHPDA, with the word "health" in its name and charged with administering a "public interest" standard (Ala. Code § 22-21-261), could not as a factor in its decision consider Clark's gross irresponsibility for permitting his buildings to deteriorate, for want of urgently needed major repairs and reconstuctions, into an extremely unsafe, unsanitary and dangerous condition. (Pet. 25) Although not expressly saying so, presumably Clark also would say that the Board could not rely in making its determination, as it did (Pet. App. 37a, 78a), on Clark's withdrawal from the business of operating nursing homes—a withdrawal voluntarily made by Clark albeit under the prospect of losing his license by action of the State Health Department because of improper patient care and unsanitary conditions. (Pet. App. 40a-47a; *see* pages 3-4, above) Clark accuses the administrative agency of changing its policy and "treating like cases differently," but

he points to no case, presenting factors similar to those presented by the unsafe and unsanitary history of the two buildings owned by him and his renunciation of conducting nursing home operations, which was treated in a way differently from the outcome here.

This case presents purely factual issues and issues committed to an administrative agency's sound discretion in terms of the public interest of assuring adequate but not redundant health care facilities for a particularly vulnerable segment of the population. No substantial federal constitutional questions are presented by the Petition and indeed no federal constitutional issue was raised in the State courts, a jurisdictional prerequisite to their consideration in this Court.

1. *No Federal Constitutional Issue was Raised in the State Courts.*—Rule 14.1(g)(i) of this Court admonishes petitioners seeking a review of state court judgments to identify "when the federal questions sought to be reviewed were raised" and "the method or manner of raising them and the way in which they were passed on" by the state courts, with "pertinent quotations of specific portions of the record." The Petitioner's response to this (Pet. 19-21) simply demonstrates that he raised a federal constitutional issue in the related proceeding in a federal District Court. *See* Pet. 19; *see* pages 7-9, 12-13, above.

As to raising federal constitutional issues in the state court proceedings, which are the proceedings review of which is now sought, Clark's quotes show only that his contentions below were made in such terms as "violation of constitutional or statutory provisions," "due process of law," "unlawful procedures," "takings" and "substantive due process." (Pet. 20) These phrases do not uniquely refer to federal law; Alabama has statutes and a Constitution; the latter begins with a Declaration of Rights; and the Declaration speaks of "due process" (Ala. Const. of 1901, art. I, § 13), and restricts "takings" (*id.* § 23). Clark never identifies where he raised any specific provi-

sion of the United States Constitution or federal statutes in the state courts whose judgments he now seeks to have reviewed. His quoted references are even more generic th the reference to the "Fourteenth Amendment" said to be insufficient in *Taylor* v. *Illinois*, 484 U.S. 400, 406 n.9 (1988). Of course, Clark admits that none of the state courts that considered his case below discussed any assertion of federal constitutional rights by him. (Pet. 20-21) This presumably was because no such assertion was made.

2. *This is Not a Case of an Administrative Agency Changing Policy or "Treating Like Cases Unlike."*—Clark claims that the agency's action is "procedurally infirm" because it has treated "like cases unlike," claiming that the agency acted in one fashion as to Clark but in a totally different fashion with regard to every other "relocation" application it has ever handled.[14] Pet. 22, 25-26. The subject of when an administrative agency may change its policy and thus treat like cases in an unlike fashion is one which has engendered scholarly discussion. *See, e.g.*, Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 507, 541 *et seq.* (1985). When this would rise to a question under the Fourteenth Amendment would be another issue. But no case of it is presented here. This argument is simply another version of Clark's argument, pressed in the federal court case and in the state courts below, that, as a matter of Alabama law and substantive

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[14] The factual basis for this assertion is unidentified. Evidently it is dependent on Clark's attempt, *see* Pet. 8-15, to have this Court re-sift the evidence considered and resolved by the Board) Pet. App. 30a-36a) through Clark's version of the facts. Also unexplained is why Clark's universe is limited to "relocation" cases; this was not a case in which there were simultaneous efforts on the parts both of Clark and of his lessees to move and obtain new CONs for their new premises. Clark rather sought to obtain authority to reopen nursing home facilities in the unsanitary and dilapidated buildings out of which the lessees had moved. *See* page 6, above. The Review Board found that repair or renovation of Clark's buildings was not a viable alternative. (Pet. App. 58a, 77a)

due process [15] the Review Board was required to treat him as having the superior grandfathered right, since landlords, rather than operator-lessees, had that right as a matter of law or under an alleged consistent administrative practice. The findings of the Review Board, however, were that no such *per se* rule could be extracted from the statute or the history of the SHPDA's administration of it, and that, as the District Court had put it, the question involved issues of "policy" committed to agency discretion to further the public interest as prescribed by the CON legislation. (App. 13a) The Review Board held, based on a thorough analysis of the testimony before it, that the established approach of the agency was in fact on a "totality of the circumstances" basis. It is, of course, the settled law in both the federal and state courts that an administrative agency may implement a statutory regulatory regime in a "case-by-case method", on the basis of such a totality of circumstances. *See American Power & Light Co.* v. *SEC*, 329 U.S. 90, 143 (1946); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); *Village of Herkimer* v. *Axelrod*, 431 N.Y.S.2d 303, 306 (3d Dep't 1982) ("public need" criterion in regulation of hospital).

Here, the totality of the circumstances, as found by the Board and not disturbed on judicial review by three Alabama courts, included the circumstances that Clark ran an unsafe and unsanitary nursing home when he was an owner-operator, one in which there was inadequate patient care, infestation by vermin and other health hazards; that Clark some years before 1979 was on the verge of having his license revoked; that there was an agreement between the State authorities and Clark that he would withdraw from the nursing home business and lease his building to an operator; that he delivered a release of his rights to operate a nursing home to his lessee; that when he built a second structure elsewhere in the County for use as a nursing home, it was always contemplated that he would

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[15] A claim made in federal constitutional terms only in the federal court.

not operate it, but would lease it to an operator on a long-term lease; that this was the state of affairs when the CON legislation became effective; and that Clark thereafter, despite his contractual obligations as landlord, refused to make necessary repairs and reconstruction and permitted the nursing homes to deteriorate so far as to exhibit virtually every form of unsafe and unsanitary condition imaginable. For a case of "unlike treatment" to be presented, Clark would have to bring forward a case where conditions of the sort just described existed and the Alabama public authorities nonetheless treated the landlord, guilty of not making badly-needed repairs and reconstructions, as being the grandfathered party entitiled to operate a "health care service" "in the public interest," rather than the lessees. To the credit of the State of Alabama, no such case exists and none has been brought forward by Clark.[16]

In this regard, however, Clark claims (Pet. 24-25) that it was error, apparently of federal constitutional dimensions, for the SHPDA to have considered the unsafe and unsanitary condition of his buildings, and his responsibility for those conditions, in reaching its decision. Clark says that under state law the only agency charged with any responsibility or having any power to deal with the unsafe and unsanitary conditions was the Department of Public Health. (*Id.* at 25) But the issue whether the SHPDA is required to shut its eyes to unsafe and unsanitary conditions in buildings used as health and nursing facilities and defer entirely on this subject to the

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[16] Factors peculiar to the Guntersville building add to the uniqueness of the present case. Clark is apparently the only person in Alabama who ever built a building for use as a nursing home in the face of the denial of an AON application for it. The beds in the Guntersville building were not approved for inclusion in the State Health Plan when the CON legislation became effective on July 30, 1979. Thus Clark's lessee, Barfield Health's affiliate and predecessor, and Barfield Health, could not obtain reimbursement for their rental expenses as costs until some two years later when Barfield Health, not Clark, made the required showing of public need for the beds.

Department of Public Health and the prosecutorial authorities, or whether it may consider issues of that sort under its "public interest" governing statute, is one which is solely an issue of Alabama law. The Alabama courts unanimously found the SHPDA's decision to be within its statutory authority.

3. *This is Not a Case of a "Taking" of Clark's Property Without Due Process.*—Although the issue appears not to have been raised below, Clark apparently contends that the Due Process Clause of the Fourteenth Amendment was violated by the administrative decision below, granting the CONs to the two lessees at their new locations. Clark claims (Pet. 22-25) that he had a "reasonable investment-backed expectation" (*Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984)), that his real estate properties could, apparently in perpetuity, be used as nursing homes, and that the grant of CONs to the lessees to operate elsewhere in effect destroyed that expectation. The short answer is that Clark could have had no such expectation. While the Alabama CON legislation was not on the books when his buildings were constructed, a system of licensure of nursing homes based on public health considerations and patient care standards was in effect.[17] A combination of Clark's unsanitary and

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[17] Indeed, one of the two buildings was constructed at a time when an "Assurance of Need" procedure, an immediate ancestor of the "Certificate of Need" procedure, was in effect; and Clark was denied an AON for the building in question. *See* page 4, above. This did not, to be sure, preclude its construction but made its construction costs ineligible for reimbursement under public assistance programs.

Clark asserts that his right to operate a nursing home was grandfathered "by express statutory grant." (Pet. 23) No such statute is cited, and as pointed out (p. 2) above, there is no express statutory grant of any grandfather rights in the CON statute. Moreover, the construction and operation of nursing homes was a field already regulated by the State when Clark constructed each of the two buildings in question. And Clark was not operating a nursing home anywhere in Marshall County when the CON legislation came into effect.

uncaring operation of the Albertville home while he was its operator and the unsafe and unsanitary conditions he permitted to exist and remain uncorrected in both nursing homes when he was simply their landlord was an essential and appropriate basis of the Review Board's decision. Faced with the deteriorated conditions at the two Clark buildings, the regulatory choice was either to permit the patients to be cared for at alternative facilities to be constructed in the county; to require that nursing care in the County be confined to Clark's unsafe and unsanitary facilities; or to shut down the nursing homes in Clark's buildings and force the patients to seek space in other nursing home services outside of the county.

Clark had no legitimate expectation when he built the buildings that he could perpetually operate the buildings as nursing homes or lease them to others for that use notwithstanding noncompliance with standards of sanitation. The maintenance of public health is a core police power of the States, and that, as Clark now claims, his most lucrative use of his buildings would be to rent them out as nursing homes does not mean that he has a federally-protected constitutional right to operate or have them operated as such without regard to standards of public health and patient care. This is not a case where either a physical invasion of property is involved or where all economically viable uses of property are forbidden, at least one of which elements, in the opinion of the majority of the Court in *Lucas* v. *South Carolina Coastal Council,* 112 S. Ct. 2886 (1992), is necessary to constitute a "taking." *See id.,* at 2893-95. Any other lawful uses of Clark's land or buildings, apart from their use as health care facilities, remains open to him. *See Andrus* v. *Allard,* 444 U.S. 51, 65 (1979).[18] Having voluntarily chosen to enter the field of activity of providing public

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[18] In a loan application for a mortgage loan on his buildings, Clark represented to the lender that the Guntersville building "can be used as a nursing home, hospital, motel/lounge and restaurant or rehabilitation center." (B/C Ex. 147; Pet. App. 60a)

health services traditionally regulated by the state under its core police power, or of acting as landlord to those who provide such services, Clark cannot complain about the existence of regulation designed to protect the public interest. *See United States* v. *Locke*, 471 U.S. 84, 104, 107-08 (1985), and cases there cited.

4. *The Unappealed Decision in the Federal District Court Case has Preclusive Effect Against the Contentions which Clark Now Seeks to Present to This Court.*—While Clark never presented his contentions in the Alabama courts as implicating the United States Constitution, he certainly did so present those contentions in his federal court case. As noted above (page 7) Clark there claimed that the initial action of the SHPDA in granting CONs to the two lessees without notice to him violated his procedural due process rights, and that it also violated his substantive due process rights, in each case under the Fourteenth Amendment. The District Court held in its opinion of April 9, 1991 that Clark's contention that as a matter of federal constitutional law the SHPDA was required to treat him, and him exclusively, as the party having "grandfather" rights was not well-taken; and the District Court held, in effect, that as a matter of federal constitutional law, the determination could be made either that Clark had a superior grandfathered right or that the lessees had such a right. (App. 12a-13a; *see* pp. 8-9, above)

A subsequent application, following the proceedings before the ALJ and the Review Board, for injunctive relief by Clark against the enforcement of the Review Board's order, resulted in a denial by the District Court and a finding that the "SHPDA has fully and carefully complied with the remedial orders of the Court." (App. 16a; see also the court's oral ruling, App. 18a) While there was an alternative ground for the court's first order, rendered prior to the administrative hearing and order of the Review Board, that Clark's contentions were premature since no hearing and decision had yet been

reached (App. 13a), the court's substantive ruling was clearly also an alternative ground. Moreover, no issue as to prematurity affected the November 14, 1991, order, rendered as it was after the administrative hearing had been held and the Review Board had entered its order.

Each of the two orders of the District Court was appealable, either as a final judgment or as an order denying an injunction. 28 U.S.C. §§ 1291, 1292(a)(1). The failure of Clark to appeal either of these rulings, disposing of the only expressly-made federal constitutional claim he has made in either court system, makes them *res judicata*. Since the Federal District Court orders recognized that the SHPDA could decide either way, this *res judicata* effect would appear to preclude any of the *per se* assertions which Clark currently makes, such as that the award of the CONs to the lessees amounts to an unconstitutional taking of his property without due process of law or that there was a Constitutionally binding *per se* rule in place at the SHPDA to the effect that the landlord rather than the operating lessee solely and exclusively possessed grandfather rights.

* * * *

Clark was afforded, following the intervention of the Federal District Court, a panoply of procedural protections for his interests. He had a lengthy evidentiary hearing before an Administrative Law Judge appointed by the Governor; a review by a Review Board; a further review by a Fair Hearing Officer; a review on a subsequent examination by the federal district court; a review by a Circuit Court in Alabama; an appeal as of right to the Alabama Court of Civil Appeals; and two examinations of the proceedings below by the Alabama Supreme Court. He presented none of his contentions as federal issues in the Alabama courts. Those contentions, in any event, raise no substantial federal issues for this Court.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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NOVEMBER 1995

APPENDIX A

**Memorandum Opinion, April 9, 1991,
U.S. District Court for the
Middle District of Alabama, in
E.L. Clark, et al. v. *Derrill Crowe, et al.***

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 86-T-139-N

E. L. CLARK and CITY FEDERAL
SAVINGS AND LOAN ASSOCIATION,
Plaintiffs,

v.

DERRILL CROWE, *et al.*,
Defendants.

MEMORANDUM OPINION

In the present phase of this litigation, plaintiff E. L. Clark, who owns a number of buildings in Alabama designed for use as nursing homes, charges that certain "state defendants" deprived him of his protected property interest in two of his nursing homes, in violation of the due process clause of the fourteenth amendment to the United States Constitution as enforced through 42 U.S.C.A. § 1983 (West 1981). The state defendants are members of the State Health Planning and Development Agency and are hereinafter referred to together as "SHPDA". Clark has invoked the court's jurisdiction pursuant to 28 U.S.C.A. §§ 1331, 1443 (West 1966,

1973 & Supp. 1990), and he seeks both declaratory and injunctive relief. City Federal Savings and Loan Association, which holds mortgages on Clark's nursing homes, is also a plaintiff in this lawsuit and joins in the claim asserted by him.

Based upon the evidence presented at a nonjury proceeding, the court concludes that Clark should prevail on his § 1983 claim and that he is entitled to appropriate declaratory and injunctive relief.

I. FACTUAL BACKGROUND

Clark is the owner of two nursing home facilities in northern Alabama. He constructed the first facility, located in Albertville, in 1961, and the second facility, located in Guntersville, in 1978. Clark operated both nursing homes, which together offered 236 beds, until he leased them to other operators in the late 1970's.[1] He leased the Albertville facility to Audrey Earle Cole and the Albertville Nursing Home, Inc. He leased the Guntersville facility to E. Brooks Barfield and Barfield Health Care, Inc.

Alabama, like many other states, closely regulates the nursing home inndustry within its borders. Chapter 21 of Title 22 of the 1975 Code of Alabama (Michie 1990) sets forth detailed regulations on a wide variety of aspects of this industry. Among these regulations, and of particular relevance to this case, is the requirement that any person desiring to construct or expand a new nursing home facility within the state or to offer new services at an existing facility must obtain a "certificate of need," more commonly called a CON, from SHPDA.[2] A CON is a state authorization designed to "assure that only those health care services and facilities found to be in the

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[1] The Albertville nursing home had 133 beds, and the Guntersville nursing home had 103 beds.

[2] 1975 Alabama Code § 22-21-265 (Michie 1990).

public interest shall be offered or developed in the state," and to "prevent the construction of unnecessary and inappropriate health care facilities through a system of mandatory reviews."[3] In furtherance of these purposes, SHPDA may award a CON only after making a factual finding that the new facility and service are consistent with the state plan and are necessary to satisfy local demand and that no more effective or efficient alternative exists.[4] SHPDA developed and used a "bed need methodology" to carry out these statutory directives. The agency determined how many nursing home beds were needed for each of Alabama's 67 counties and authorized beds for each county only up to that county's number. An individual holding CON authority for a certain number of beds retains it until he relinquishes it by no longer

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[3] § 22-21-261.

[4] Section 22-21-266 provides that:

> No certificate of need for new inpatient facilities or services shall be issued unless the SHPDA makes each of the following findings:
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> (1) That the proposed facility or service is consistent with the latest approved revision of the appropriate state plan effective at the time the application was received by the state agency;
>
> (2) That less costly, more efficient or more appropriate alternatives to such inpatient service are not available, and that the development of such alternatives has been studied and found not practicable;
>
> (3) That existing inpatient facilities providing inpatient services similar to those proposed are being used in an appropriate and efficient manner consistent with community demands for services;
>
> (4) That in the case of new construction, alternatives to new construction (e.g., modernization and sharing arrangement) have been considered and have been implemented to the maximum extent practicable; and
>
> (5) That patients will experience serious problems in obtaining inpatient care of the type proposed in the absence of the proposed new service.

offering the service for a 12-month period.[5] The Alabama Department of Public Health still retained the authority to license nursing homes; however, it could license only fewer, not more than, the number of beds SHPDA approved for an area.[6]

An applicant for a CON must provide sufficient information and technical data to allow SHPDA to assess the merits of the application and to make the necessary findings of fact to support the issuance of the certificate.[7] SHPDA developed two types of procedures for reviewing applications: the first is plenary and affords an extensive review process; the second is more truncated and may be used only in an emergency, where patients are endangered by a lack of health care facilities or by the conditions at existing facilities. On August 4, 1984, the Governor of Alabama issued an Executive Order placing a moratorium on the issuance of CONs in any but emergency situations.

The law requiring CONs went into effect in 1979. However, it required CONs for only new health care facilities and services, that is, those put into operation after the date of the law.[8] Persons already offering facilities and services on the date of the law could continue to offer them without a CON. These existing facilities and services were, in the words of Clay H. Dean, the

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[5] § 22-21-270(d); Plaintiff's exhibit no. 28. A holder may also relinquish the authority by disposing of the facility in some manner.

[6] § 22-21-276(b).

[7] § 22-21-267.

[8] Section 22-21-265(a) provides that:

> On or after July 30, 1979, no person to which this article applies shall acquire, construct or operate a new institutional health service, as defined in this article, or furnish or offer, or purport to furnish a new institutional health service, as defined in this article, or make an arrangement or commitment for financing the offering of a new institutional health service, unless such person shall first obtain from the SHPDA a certificate of need therefor.

person who drafted the CON legislation and who served as director of SHPDA, "grandfathered in". Under the CON statute, grandfathered facilities and services and those facilities and services with a CON certificate were, in effect, on a par. The CON statute, therefore, authorized a person to offer health care facilities and services in only two circumstances: first, if the person had obtained a CON from SHPDA; and, second, if the person was already offering the facilities and services when the CON statute went into effect. If a person sought to offer health care facilities and services under any other circumstances, SHPDA would consider the operation as illegal under the CON statute and would seek a court order to enjoin it.

As Clay explained further, the law therefore did not require that Clark or his two lessees, Cole and Barfield, obtain CONs for the Albertville and Guntersville facilities. Clark and his two lessees could continue to offer 236 beds at the two facilities without CONs; they would need a CON only if they decided to build a new facility or offer new services. The two facilities were, in effect, "grandfathered" in under the CON law.

The value of grandfathered facilities, such as those at Albertville and Guntersville, increased dramatically—particularly in those areas where the bed limit for the county was exhausted. The CON law, by restricting the number of beds which could be located in a county and by grandfathering in these existing facilities, conferred a new and independent value on these facilities. These facilities had CON status in a market where under the CON statute no new beds, or only a few, were available. These facilities, which could lose their CON status only if they ceased to offer health care facilities and services for a 12-month period, were obviously of much greater value as a nursing home than one without such authorization. Indeed, a facility without authorization was of no value at all as a nursing home.

In 1985, Cole and Barfield decided to open their own nursing homes. They submitted applications to SHPDA requesting that they be allowed, under the emergency CON provisions, to replace or relocate the 236 beds in the Albertville and Guntersville facilities to new homes. SHPDA approved the applications without giving notice to Clark. In 1986, Cole and Barfield moved into their new facilities, leaving Clark's structures vacant. Later, Clark applied to the Alabama Department of Public Health for a license to operate his nursing homes at Albertville and Guntersville. The Public Health Department denied his request because he did not have CON authorization for any beds in his facilities.

II. PROCEDURAL BACKGROUND

Clark filed this lawsuit in February 1986, claiming that numerous state officials acting together with private individuals, including Cole and Barfield, conspired to deprive him of his property rights to the Albertville and Guntersville nursing homes in violation of the due process clause as enforced by § 1983. In *Zinermon v. Burch*, —— U.S. ——, ——, 110 S.Ct. 975, 983 (1990), the Supreme Court explained that there are three types of claims that may be brought under the due process clause. The first relies on the specific protections in the Bill of Rights incorporated into the clause, and the second relies on a substantive component in the clause that "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them." *id.*, quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 664 (1986). "As to these two types of claims, the constitutional violation actionable under § 1983 is complete when the wrongful action is taken." *Id.* The third type of claim encompasses "a guarantee of fair procedure." *Id.*

Relying on the third type of claim, Clark contended that the defendants, acting under color of state law, de-

prived him of his beds in the Abertville and Guntersvile facilities. He alleged that the defendants did this by "negligently, wantonly, fraudulently and/or intentionally" using the CON emergency procedures when no emergency existed; he did not challenge the adequacy of the emergency procedures themselves, but rather claimed that the emergency procedures were inappropriately applied. The court dismissed his complaint on the basis that he enjoyed a sufficient state remedy for the injury he alleged.[9] The court based its dismissal on *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), and *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194 (1984). In these two cases, the Supreme Court held that a post-deprivation remedial mechanism satisfied due process requirement in a situation involving negligent and intentional acts committed by state officials acting outside their grant of authority.

Clark amended his complaint after this ruling, challenging for the first time the adequacy of the emergency procedures by which Cole and Barfield had obtained their CONs. This amendment of the § 1983 claim presented the question of whether a pre-deprivation hearing was practicable and feasible in the context of the emergency CON statute. Clark claimed, in essence, that he should have received notice of, and an opportunity to be heard regarding, Cole's and Barfield's application to relocate or replace the beds in his two facilities. In his amended complaint, Clark also claimed that the decision to allow

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[9] Section 22-21-276 of the 1975 Alabama Code provides that:

> Injunctive relief against violations of this article or any reasonable rules and regulations of the SHPDA may be obtained from the circuit court of Montgomery county, Alabama, at the instance of the SHPDA, any holder of a certificate of need that is adversely affected in the exercise of privileges thereunder by such violation or any member of the public directly and adversely affected by such violation.

Cole and Barfield to relocate or replace the beds violated the due process clause because it was arbitrary and capricious. Finally, Clark claimed that the defendants entered into a racketeering enterprise with the goal and effect of depriving him of his property interest, in violation of the Racketeer Influenced and Corrupted Organizations Act (RICO), 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1990).

Pursuant to the amendment, the court vacated its previous dismissal of Clark's lawsuit. The court noted that post-deprivation remedies do not satisfy the minimal requirements of procedural due process when pre-deprivation remedies are practicable. *E.g., Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433-34, 102 S.Ct. 1148, 1156-57 (1982). Since the focus of Clark's § 1983 theory of relief shifted from the merits of Cole's and Barfield's applications in the allegedly arbitrary decisionmaking of the state defendants to the feasibility of a mandatory hearing in which interested parties could speak to an emergency CON application, the court found that *Parratt* and *Hudson* did not bar Clark's amended cause of action. When the plaintiff's challenge extends to the constitutional validity of an established procedure authorizing the state actor's conduct, the existence of a statutory post-deprivation remedy does not displace the plaintiff from his constitutional forum. *See Zinermon v. Burch,* —— U.S. at ——, 110 S.Ct. at 988 ("when [state] officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of liberty, the state officials cannot then escape liability by invoking *Parratt* and *Hudson*"); *see also Fetner v. City of Roanoke,* 813 F.2d 1183, 1184-86 (11th Cir. 1987); *Messick v. Leavins,* 811 F.2d 1439, 1441-43 (11th Cir. 1987).

In a later order, the court found that Clark's § 1983 claim was viable against only SHPDA. The court also concluded that Clark's RICO claim was viable only

against the private defendants and that, because Clark's RICO claim is dependent on resolution of the constitutionality of the emergency CON procedures, the RICO claim should be stayed for trial until after the § 1983 claim is resolved. The court then proceeded to trial on Clark's § 1983 claim. The court also considered whether City Federal Savings and Loan Association, which holds mortgages on Clark's two nursing homes, has a similar viable claim under § 1983.

III. LEGAL DISCUSSION

A.

To obtain relief on his claim, Clark must prove that he had a property interest protected by the auspices of the due process clause of the fourteenth amendment and that the statutory procedure by which his interest was impaired failed to afford him adequate procedural safeguards. *See, e.g., Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 1491 (1985). At the end of the nonjury proceeding on his claim, all parties agreed that, if Clark had a protected property interest, he did not receive the process due him. In other words, if Clark was entitled to notice and an opportunity to be heard regarding Cole's and Barfield's applications, SHPDA could have given him such process before it acted on the applications, regardless as to whether the applications were made under the emergency procedures or the plenary procedures. The parties, therefore, agreed that the only determinative issue for the court is whether Clark had a protected property interest.

Federal courts have long recognized that, "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it" and "more than a unilateral expectation of it." *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). The person "must, instead, have a legitimate claim of

entitlement to it." *Id.* These claims or property interests find their definition and origin not in the United States Constitution but in existing rules or mutual understandings that stem from an independent source such as state law and that secure certain benefits and support claims of entitlement to those benefits. *Id.* Thus a close examination of the proffered state law basis for Clark's claim is necessary to evaluate the defendants' challenge. *See Davis v. Scherer*, 468 U.S. 183, 193 n.11, 104 S.Ct. 3012, 3018 n.11 (1984).

The court is convinced, from a review of Alabama law, that a person holding a CON issued by SHPDA has a protected property interest in that CON which can be taken away only if attended by adequate procedural protections. The CON statute provides that a person holding a CON retains the privileges authorized under it until he or she fails to offer the authorized health care facilities and services for a period of twelve months. The CON can, therefore, be terminated only for cause.

SHPDA maintains, however, that a person owning a facility grandfathered in under the CON statute is not similarly situated. The agency contends that, because the statute does not mention such persons, it does not reach such persons and thus has conferred nothing on them. The agency's view of the source of state law which may confer a property interest is much too narrow. As this court explained above, property interests arise not merely from the provisions in a state law but also from the "rules" and "understandings" stemming from that law. Therefore, although the CON law may not mention grandfathered facilities and services, the rules and understandings stemming from the law clearly include them.

As the court explained earlier, under SHPDA rules and regulations, grandfathered facilities and services and those facilities and services with CON certificates are clothed with the same legal privileges in at least two respects. First, a person is authorized to offer health care facilities

and services in only two circumstances: first, if the person has obtained a CON from SHPDA; and, second, if the person was already offering the facilities and services when the CON statute went into effect. If a person sought to offer health care facilities and services under any other circumstances, SHPDA would consider the operation as illegal under the CON statute and would seek to have a court enjoin it. SHPDA, therefore, treats the two types of authorization the same. Second, SHPDA rules and regulations provide that a grandfathered facility, like a CON certified facility, can forfeit its authorization only if it fails to offer its services for a 12-month period. Persons with grandfathered facilities and CON certified facilities have the same expectations of continued authorization. Therefore, persons with grandfathered facilities have the same "legitimate claim of entitlement" to continued authorization as do persons holding actual CON certificates.

SHPDA has suggested from time to time that there is no such notion as "grandfathered status" under either the CON statute or the rules and understandings adopted by SHPDA pursuant to the statute. This argument is disingenuous. The Rules and Regulations Manual adopted by SHPDA in 1979 expressly contains a "Grandfather Clause" covering existing facilities.[10] Moreover, the directors and board members of SHPDA have routinely used the term "grandfather status" to refer to such facilities.[11]

The final question for the court is whether Clark holds a grandfathered interest in the Albertville and Guntersville facilities. SHPDA argues that Clark was a simple landlord, who had at most only a property interest in the physical buildings at Albertville and Guntersville. The credible evidence before the court does not fully support this contention. The court agrees with Clay H. Dean,

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[10] Plaintiff's exhibit no. 127.

[11] *See, e.g.*, Plaintiff's exhibit no. 106 and testimony of Clay H. Dean and Kay Miller at trial.

the drafter of the CON legislation and a former director of SHPDA, that Clark leased more to Cole and Barfield than just physical plants. He leased nursing home operations to them. Clark and his tenants agreed that the tenants would continue to operate and administer nursing homes in the two facilities. An expressed condition in the lease contracts was, therefore, that the tenants would take over nursing home operations. Moreover, in one of the leases entered into by the parties, Clark leased a specific number of 'beds,' and calculated the rent by the number of beds in use in the building. This lease further provided that, should the tenant expand the nursing home beds in that facility, there would be a proportional increase in rent. The court agrees with Dean and finds from the evidence that Clark had a sufficient interest in the operation of the two facilities to enjoy a "grandfather status" when the CON statute went into effect in 1979.[12] The court cannot say that his status was exclusive, however. Cole and Barfield, as operators of the two nursing homes, also had an expectation in the continued operation of the two facilities when the CON law went into effect.[13]

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[12] There is a historical basis for this conclusion in the operation of SHPDA. For example, in the case of Geriatrics, Inc., SHPDA treated Geriatrics rather than its lessee as the party with grandfather status when the CON law went into effect.

Ideed, Derrill Crowe, who was a member of the SHPDA, admitted that if all the circumstances surrounding Clark's interest in the two homes had been known to the agency, the decision could have been different.

[13] SHPDA, Cole, and Barfield point out that Cole obtained an "Assurance of Need" certificate in the mid-70's. This certificate allowed Cole to obtain reimbursement of certain capital costs. It did not, by itself, convey to her any interest in the beds in the Albertville home. By the same token, Clark's inability to obtain a similar certificate for the Guntersville home in no way impaired his legal status as owner of the nursing home operation. It simply meant that he could not get the reimbursement he wanted.

The defendants further point out that Barfield obtained a CON for the Guntersville facility in early 1980. The evidence reflects,

Clark asks that the court determine who holds the superior interest. The court declines the invitation. The determination turns on more than just legal principles. Whether a lessor or a lessee of a nursing home operation should be considered as the superior holder of a grandfathered operation is more than likely also a matter of policy. Indeed, there was conflicting testimony before the court as to which result, in general and in this case specifically, would better further the public interests of the CON statute. SHPDA should resolve this issue, not the court.

B.

As stated, Clark also claims that SHPDA's actions were arbitrary and capricious, in violation of the due process clause. The court must reject Clark's claims for two reasons. First, it would be premature for the court to reach this issue. SHPDA has yet to hear from Clark and to decide then whether his contentions have merit. But second, even if the court were to reach the issue, it could not agree with Clark that SHPDA could find in his favor only. As the court discussed above, the evidence reflects that Clark and his lessees have a shared interest in the grandfather status of the Albertville and Guntersville facilities.

C.

City Federal Savings and Loan Association also claims that it had a protected property interest in the beds lo-

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however, that this CON was unnecessarily and improperly issued to him.

Cole also refers to a "mysterious" 1976 document in which she says Clark conveyed his CON interest in the Albertville "beds" to her. The court refuses to credit this document. First, the document is questionable because Clark did not sign it; rather, Cole says that someone signed it in his behalf. Second, the document purports to convey CON rights three years before the CON statute was enacted. In any event, a person cannot convey his or her CON interest to someone else. *See* 1975 Alabama Code § 22-21-270(e) (Michie 1990).

cated at the Albertville and Guntersville facilities which could not be taken away without notice and an opportunity to be heard. City Federal's claim is wholly lacking in merit. City Federal's property interest extended only to the buildings housing the two nursing facilities; the bank had no interest in the beds in the two facilities. City Federal was, therefore, not entitled to either notice or an opportunity to be heard regarding Cole's and Barfield's applications to relocate or replace the beds.[14]

IV. RELIEF

Because SHPDA improperly denied Clark notice of Cole's and Barfield's requests to transfer beds from Clark's facilities to their own and an opportunity to be heard on these requests, SHPDA must now offer Clark a meaningful opportunity to be heard on the requests and must further reconsider the requests de novo in light of any appropriate comments and evidence Clark might present. The court will, therefore, enter appropriate declaratory and injunctive relief to this effect.

DONE, this the 9th day of April, 1991.

/s/ Myron H. Thompson
United States District Judge

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[14] City Federal also suggests that SHPDA violated the equal protection clause in the fourteenth amendment to the United States Constitution. The claim is also premature because SHPDA has yet to hear from Clark and reach a decision. In any event, to state an equal protection claim, a plaintiff must allege that the defendant's conduct was intentionally discriminatory, that is, was based on some unjustifiable standard such as race, religion, or other arbitrary classification. *E & T Realty v. Strickland*, 830 F.2d, 1107 (11th Cir. 1987), *cert. denied*, 485 U.S. 961, 108 S.Ct. 1225 (1988). Clark makes no such allegations here.

APPENDIX B

May 2, 1991, Order
U.S. District Court for the
Middle District of Alabama, in
E.L. Clark, et al.* v. *Derrill Crowe, et al.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 86-T-139-N

E. L. CLARK and CITY FEDERAL
SAVINGS AND LOAN ASSOCIATION,
Plaintiffs,

v.

DERRILL CROWE, *et al.*,
Defendants.

ORDER

Upon consideration of the motion to alter or amend judgment filed by plaintiff E. L. Clark on April 23, 1991, it is ORDERED that the motion is denied. The State Health Planning and Development Agency may receive any evidence necessary for its decision, and this evidence may come from any source, including but not limited to plaintiff Clark and defendants Cole and Barfield. The issue of what evidence the agency may receive is a matter for the agency and not this court. However, Cole and Barfield should not be advantaged in any way by the fact that they have had use of the "beds" since the agency's original decision allowing the transfer of the beds.

DONE, this the 2nd day of May, 1991.

/s/ Myron H. Thompson
United States District Judge

APPENDIX C

November 14, 1991, Order
U.S. District Court for the
Middle District of Alabama, in
E.L. Clark, et al.* v. *Derrill Crowe, et al.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 86-T-139-N

E. L. CLARK and RESOLUTION TRUST CORPORATION,
Plaintiffs,

v.

DERRILL CROWE, *et al.*,
Defendants.

ORDER

Upon consideration of the emergency motion for temporary and permanent injunctive relief, etc., filed by plaintiff E. L. Clark on November 12, 1991, it is ORDERED that the motion is denied. The evidence reflects that SHPA has fully and carefully complied with the remedial orders of the court.

DONE, this the 14th day of November, 1991.

/s/ Myron H. Thompson
United States District Judge

APPENDIX D

Excerpt From Transcript of Hearing on Clark's Emergency Motion, November 14, 1991 U.S. District Court for the Middle District of Alabama, in *E.L. Clark, et al.* v. *Derrill Crowe, et al.*

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[17] MS. McNEIL: Your Honor, I represent SHPDA. I'm Margaret McNeill. And our position is that we follow the [18] court order exactly. Your order dated April 9, 1991 on Page 15, it states, "Clark asks that the Court to determine who holds the superior interest. The Court declines the invitation."

It goes on to say that, "SHPDA should resolve this issue, not this Court." After a lengthy hearing, it was held over a period of two weeks, there were 24 witnesses, and 1900 pages of testimony, which we brought with us. A lengthy well-reasoned order, I believe, it was 60 the pages, given by Administrative Law Judge Clark Wilkerson, it was found that Barfield and Albertville held the superior interest. SHPDA did exactly as you told us to do. We found who had the superior interest, and that's Albertville and Barfield. Therefore, we complied strictly with the court order. We've given Mr. Clark all the due process.

I believe there's a motion for clarification before Your Honor as to which kind of hearing SHPDA had to give him. There are two kinds, one before the CON Review Board, and one pursuant to the contested case provisions of the Alabama Administrative Procedures Act.

Clark requested the hearing according to the contested provisions of the Alabama Administrative Procedures Act, and this is the hearing that was held. Clark got all of the due process he has asked for. Simply that the

hearing officer found that Albertville and Barfield had the superior [19] interest. Therefore, we have done everything that you asked us to do in giving Mr. Clark all the process that you have ordered us to give him. In fact, there is a fair hearing, which is set on tomorrow, which is another step in the due process. That is set to be held. We've already given him due process on that.

So the agency has clearly gone through all of the administrative process we can. There's nothing more we can do here. Thank you, Your Honor

THE COURT: Thank you.

The Court does talk about inferior and superior interests at times. It also talks about that a person holding a CON, that is, protective property which can be taken away only if done by adequate procedural protections. The Court was under the impression that the real issue in this case, and the Court remains under the impression, is that Mr. Clark have his day in court, and in that sense that he have his day before the state agency.

Mr. Clark has now had that. It may have developed in a state agency determination, cutting off any interest he may have had. It doesn't necessarily mean he didn't have any interest, it may be that the other contender, they decided that his was inferior, or his was just cut off, depending on how you want to read it. But what was critical to me was the fact that he was heard. He got a reasonable decision.

[20] That was the thrust of the order that I issued. I wanted the agency to have the freedom to conduct a de novo hearing. I did not want a straitjacket here, except with regard to the matter that Mr. Clark not be disadvantaged by anyone. I find no failure to comply with the Court's immediate order. The motion is denied.

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